RECORD, CASE No. 14,019.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~336~~. 95

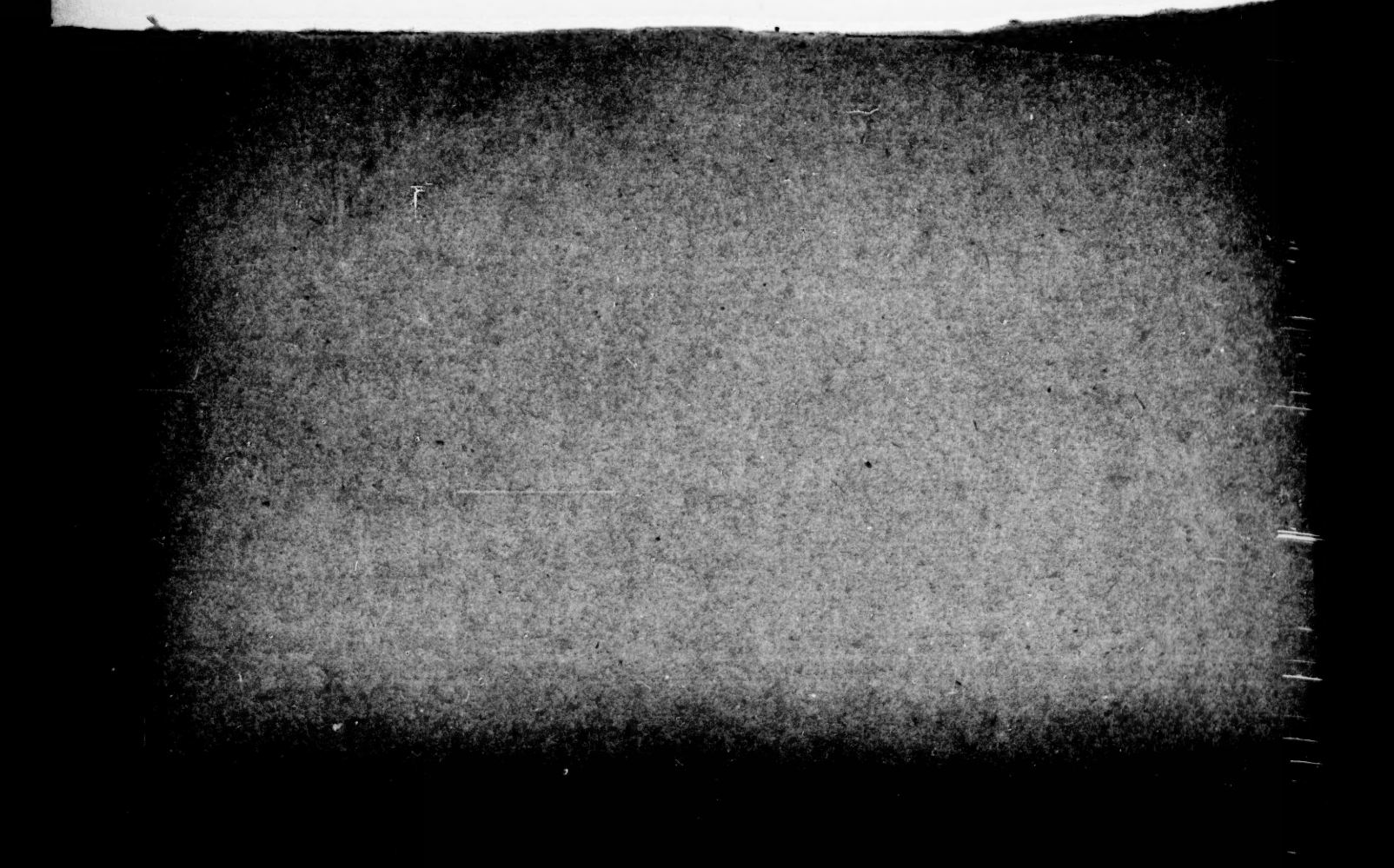
WILLIAM M. HARRISON AND JOHN A. GAMBLE, DOING BUSINESS AS THE SOUTH SIDE REFINING COMPANY, PLAINTIFFS IN ERROR,

vs.

THE TARBORO' OIL MILLS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED APRIL 22, 1890.



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 21, 1893.

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1 *Docket Entries.*

Among the rolls, records, and judicial proceedings had in the circuit court of the United States for the western district of Pennsylvania, entered at No. 24, Nov'r term, 1889, wherein The Tarboro' Oil Mills is plaintiff and Harrison and Gamble, doing business as the South Side Refining Company, are defendants, may be found the following words and figures, to wit:

THE TARBORO' OIL MILLS, a Corporation and Citizen of the State of North Carolina, Doing Business in the County of Edgecombe, State Aforesaid,
vs.
WILLIAM M. HARRISON and JOHN A. GAM*gam*BLE, Partners Doing Business as The South Side Refining Company, Citizens of Williamsport, in the County of Lycoming and Commonwealth of Pennsylvania.

No. 24, Nov. Term, 1889.

H. & G. C. Burgwin.
H. C. & S. T. McCormick.

Præcipe for summons, plaintiff's statement, affidavit of claim, etc.' filed Oct. 12, 1889. Same day, summons issued, returnable second Monday of November next.

1889, Nov. 4.—Precipe for appearance of H. C. & S. T. McCormick, Esqs., for defendant, reserving all exceptions, filed.

2 1889, Nov. 9.—Affidavit of defence filed.

1889, Nov. 13.—Upon motion of plaintiff's counsel, rule granted to show cause why judgment should not be entered against defendant for want of a sufficient affidavit of defense; rule returnable in 10 days; reasons filed.

1889, Nov. 14.—Writ returned served on Oct. 22, 1889, upon defendants personally and by copy. Same day delivered to each a copy of plaintiff's statement and claim, at Williamsport, Mar., $17.60.

1889, Nov. 23.—Proof of service of rule for judgment filed.

1890, Jan'y 13.—Letter referred to in defendant's aff't of defence and made part thereof filed by leave of court.

Same day, rule for judgment for want of a sufficient affidavit of defence argued, *c. a. v.*

1890, Jan'y 15.—Supplemental affidavit of defence filed in pursuance of motion this day made, but upon condition that the plaintiff shall have the right to file as part of its statement of claim a copy, verified by affidavit, of the defendant's letter to which the plaintiff's letter of Dec. 3, 1888, was an answer.

Feb'y 1, 1890.—Supplemental affidavit of plaintiff filed in pursuance of order and leave of court this day made.

1890, Feb'y 4.—Opinion of the court on above rule for judgment, with order making rule absolute, and directing that the amount

due the plaintiff be ascertained by the clerk *sec. reg.*, as per the plaintiff's statement of claim and attached bill of particulars, and directing that judgment for the same be entered in favor of the plaintiff, filed.

1890, Feb'y 4.—In pursuance of the foregoing order judgment is hereby entered in favor of the plaintiff and against the
3 defendants in the sum of seven thousand nine hundred seventy-five and $\frac{5}{100}$ ($7,975.05) dollars.—H. D. Gamble, clerk.

1890, March 24.—Bond on writ of error in the sum of $15,950.10, with John M. Young and Albert D. Hermance as sureties, presented and approved by Hon. M. W. Acheson, J., and filed.

Same day, writ of error, returnable in the U. S. Supreme Court on second Monday of October next, allowed by Hon. M. W. Acheson, J.; also citation signed by Hon. M. W. Acheson, J., returnable at the same time and place as writ of error.

1890, March 25.—Citation served on H. & G. C. Burgwin, Esqs.' att'ys for Tarboro' Oil Mills.

(*Præcipe for Summons.*)

In the Circuit Court of the United States, Western District of Pennsylvania.

THE TARBORO' OIL MILLS, a Corporation and Citizen of the State of North Carolina, Doing Business in the County of Edgecombe, State Aforesaid,	
vs.	No. —, Nov. Term, 1889.
WILLIAM M. HARRISON and JOHN A. GAMBLE, Partners Doing Business as The South Side Refining Company, Citizens of Williamsport, in the County of Lycoming and Commonwealth of Pennsylvania.	

4 To H. D. Gamble, clerk of said court:

Issue writ of summons in action of assumpsit as above, returnable the 2nd Monday in December next, *sec. reg.*

H. & G. C. BURGWIN,
Attorneys for Plaintiff.

Pittsburgh, Oct. 11, 1889.

Filed Oct. 12, 1889.

H. D. GAMBLE, *Clerk.*

(*Plaintiff's Statement and Affidavit of Claim.*)

In the Circuit Court of the United States for the Western District of Pennsylvania.

THE TARBORO OIL MILLS, a Corporation and Citizen of the State of North Carolina, Doing Business in the County of Edgecombe, State Aforesaid,	
vs.	No. —, of Nov. Term, 1889.
WILLIAM M. HARRISON and JOHN A. GAMBLE, Partners Doing Business as The South Side Refining Company, Citizens of Williamsport, in the County of Lycoming and Commonwealth of Pennsylvania.	

5 *Plaintiff's Declaration and Statement of Its Demand and Affidavit of Claim.*

The above-named plaintiff brings this its suit against the above-named defendants, and thereupon makes the following statement of its demand against the defendants and of the facts upon which said demand arises:

The said plaintiff, The Tarboro' Oil Mills, is a corporation duly incorporated under the laws of the State of North Carolina and a citizen of said State, having its place of business in the county of Edgecombe and State aforesaid, and the defendants, William M. Harrison and John A. Gamble, are citizens of the State of Pennsylvania, partners doing business, under the name and style of the South Side Refining Company, in the town of Williamsport and State of Pennsylvania aforesaid.

During the year 1888 and from that time on the plaintiff was and has been engaged in manufacturing and selling cotton-seed oil at its mills or works in or near the town of Tarboro', in the county of Edgecombe aforesaid, and the defendants were at the same time engaged in the business of refining cotton-seed and other oils at their works in the town of Williamsport, in the said State of Pennsylvania.

In the fall of 1888, after the time plaintiff had begun the manufacture of oil from the cotton seed of that year's growth, plaintiff sold to defendants three hundred barrels of the oil they were then manufacturing, and had already delivered a part thereof when, on or about December 8th, 1888, the said plaintiff and defend-

6 ants made and entered into another contract, by which plaintiff agreed to sell to the defendants the remainder of the said current season's run of oil over and above the three hundred barrels previously sold, to be shipped to defendants at Williamsport in fifty-barrel lots as fast as gotten ready, at the rate of forty-three cents per gallon, delivered free on railroad cars at the town of Tarboro', in the county of Edgecombe aforesaid; sight drafts for the proceeds of

which shipments to accompany bills of lading for the same; and the said defendants agreed to receive said oil and to pay for it at the rate and on the terms aforesaid on presentation of plaintiff's said drafts and bills of lading.

The said contract was made and entered into under and by virtue of and is evidenced by the correspondence, of which true copies are here given.

In reply to a letter from defendants, written after the delivery to them of about one hundred of the three hundred barrels of oil above mentioned, inquiring on what terms plaintiffs would contract with them for the remainder of its season's run of oil, said plaintiff wrote them *for the remainder of its season's run of oil, said plaintiff wrote them* as follows:

TARBORO', N. C., *Dec.* 3, 1888.

South Side Refining Co., Williamsport, Pa.:

Answering yours of recent date, we are willing to make contract for the sale of our season's run of oil, to be shipped in 50-bbls. lots as fast as gotten ready, at 43c. per gal., f. o. b. here; sight draft with b. l.

7 If you want to close contract at above price and terms, advise me at once.

Yours truly, H. K. NASH, JR., *Sec't.*

To which plaintiff received the following telegraph dispatch from defendant:

The Western Union Telegraph Co.

Received at —.

Dated WILLIAMSPORT, *Dec.* 6, 1888.

To Tarboro' Oil Mills:

Letter and offer received; fix probable number of barrels.

SOUTH SIDE REFINING CO.

To this telegram plaintiff replied by letter as follows:

TARBORO', N. C., *Dec.* 7, 1888.

South Side Refining Co., Williamsport, Pa.:

Answering your telegram of 6th, are not prepared to say exactly how much oil we will make. One of our presses is broken, and we have been doing half work now for two weeks. We are preparing to put in an extra press in a few weeks, when we should be able to make 14 or 15 bbls. per day.

Yours truly, H. K. NASH, JR., *Sec't.*

8 And next day, December 8th, plaintiff received the following telegram from defendants:

The Western Union Telegraph Co.

Received at Tarboro', N. C., Dec. 8, 1888.

Dated WILLIAMSPORT, PA., —— 8.

To Tarboro' Oil Mills:

We accept your offer, but are still without answer to inquiry regarding approximate output.

SOUTH SIDE REFINING CO.

On same day plaintiff wrote defendant as follows:

TARBORO', N. C., *Dec.* 8, 1888.

South Side Refining Co., Williamsport, Pa.

I have your t'm accepting my offer of 43 cents for our season's run of oil, f. o. b. here. As I wrote you yesterday, we are a little short just now, as one of our presses is broken, but it will be in again next week.

I calculate that we will make about 1,500 bbls. more of oil than our present contract with you will take. Of course, this is presuming as much seed for the balance of the season as we did from this time last season.

Very truly, H. K. NASH, JR., *Sec't.*

In due course of mail plaintiff received the following letter from defendant:

WILLIAMSPORT, PA., *Dec.* 10, '88.

Tarboro' Oil Mills:

9 GENTLEMEN: We have your letters of the 7th and 8th, giving about the probable amount of oil you will turn out the balance of the season; also confirming our acceptance of your offer for about 1,500 barrels in addition to present contract, shipment to be made in 50-barrel lots. We would request that you notify us of any oil you will have ready for us a few days in advance of shipment, as we may wish to change the destination of some from Williamsport. We understand that your rate to New York is 95 cents per barrel. Is this correct? We would suggest that you notify your bank correspondents to collect your drafts upon us through the First National Bank, Williamsport. We are occasionally absent for a day, and as you deposit them as cash items we could not expect a bank at which we do not trade to hold draft over a day for our return. This request from you will doubtless be cheerfully complied with by your correspondents, as the bank mentioned is one of the prominent and prompt institutions of this city.

Very truly, SOUTH SIDE REFINING CO.

Thereupon the said plaintiff began to deliver and continued to deliver the output of their mills to the said defendants, in accordance with the terms of said contract, until on or about the fourth day of

February, 1889, when the defendants wrongfully and without just cause violated their said contract with plaintiffs and refused to receive or pay for any more oil in accordance with the terms of said contract, and notified the plaintiff of such their refusal, and refused to pay the draft upon them in accordance with the terms of said contract for the proceeds of a certain shipment of oil made
10 by plaintiffs on or about the 5th day of March, 1889, received by the said defendants and appropriated to their own use, and the said oil has never yet been paid for. And plaintiff alleges that its season's run of oil was complete on or about the 16th day of July, 1889.

And plaintiff further alleges that on the refusal as aforesaid by defendants to receive and pay for any more oil according to the terms of the said contract plaintiff, after due notice thereof to defendants, proceeded to ship the remainder of the season's run of oil to New York, the nearest and best market for that purpose, and sold the same at public sale, for the best and highest market price for prime crude oil, and has carried the net proceeds of said sales to credit of defendants.

And plaintiff complains and alleges that it suffered great loss and damage in consequence of said refusal upon the part of defendants to perform their part of said contract and to receive and pay for the said oil from its, plaintiff's, works in Tarboro'. And plaintiff claims and alleges that the damage which it sustained by reason of defendants' refusal and neglect to perform their contract as aforesaid and the amount now claimed to be due to said plaintiff by said defendants by reason thereof amounts to the sum of $7,562.43, with interest as hereinafter more fully set forth, as will more fully appear by the bill of particulars, hereto annexed and made part hereof, showing the amount of the season's run of oil, the dates and amounts of shipments to defendants received by them, amount of payments made by them, and of cash received by plaintiffs on account of oil sold by them after and on account of refusal of defendants to receive and pay for the same according to the terms
11 of their contract as above set forth; which bill of particulars is in all respects accurate and correct and is correctly copied from plaintiff's book of original entries.

Plaintiff is willing, and so notified defendants at or about the time, to allow defendants, as of the 8th day of March, A. D. 1889, a credit of 3c. per gallon on ten barrels of oil, say $15.25, on account of said ten barrels having been inadvertently drawn before it was well settled.

And the plaintiff claims interest on the several and respective amounts which would have been due and payable on the shipment of oil under the contract, giving the defendants due credit from time to time for the net proceeds of sales of oil, as set forth in said bill of particulars.

Defendants are also entitled to a credit of, say, twenty-three dollars of the 9th day of May, A. D. 1889, for one barrel of oil erroneously charged to them on that date.

The shipment of sixty barrels instead of fifty barrels March 5th and the draft for thirty days instead of sight was at the request of defendants and for their accommodation.

THE TARBORO' OIL MILLS,
By H. K. NASH, *Sect. & Manager.*

12 South Side Refining Co., Williamsport, Pa., to Tarboro' Oil Mills, Dr.

Terms: Sight draft, bill lading attached.

Jan.	11.	To 50 bbls. prime crude c. s. oil, 2,555$\frac{11}{15}$ galls., at 43c.			$1,098	97
"	17.	" 50 " oil, 2,594$\frac{4}{15}$ galls., at 43c.			1,115	53
"	25.	" 50 " " 2,573$\frac{3}{15}$ " " "			1,106	48
"	31.	" 49 " " 2,520$\frac{4}{15}$ " " "			1,083	71
Feb.	9.	" 50 " " 2,572$\frac{8}{15}$ " " "			1,106	19
"	14.	" 60 " " 3,091$\frac{8}{15}$ " " "			1,329	49
"	21.	" 50 " " 2,566$\frac{8}{15}$ " " "			1,103	60
Mar.	5.	" 50 " c. s. oil, 3,110 galls., at 43c.		$1,337 70		
		Int. on same, 30 days (bill rend.)		8 91		
		Protest fees on 30-day draft for same		4 38		
					1,350	99
"	8.	" 60 " c. s. oil, 3,131$\frac{1}{15}$ galls., at 43c., bill rend.			1,346	53
"	14.	" 60 do. 2,610$\frac{2}{15}$ " " 43c., "			1,122	64
"	18.	" 50 do. 2,556$\frac{8}{15}$ " " 43c., "			1,099	31
"	29.	" 50 do. 2,579$\frac{3}{15}$ " " 43c., "			1,109	19
Apr.	2.	" 50 do. 2,589$\frac{9}{15}$ " " 43c., "			1,113	53
"	6.	" 50 do. 2,579$\frac{3}{15}$ " " 43c., "			1,109	34
"	11.	" 50 do. 2,568$\frac{4}{15}$ " " 43c., "			1,104	64
"	17.	" 50 do. 2,546$\frac{10}{15}$ " " 43c., "			1,095	07
"	23.	" 50 do. 2,570$\frac{2}{15}$ " " 43c., "			1,105	16
"	27.	" 50 do. 2,551$\frac{7}{15}$ " " 43c., "			1,097	13
May	3.	" 50 do. 2,544$\frac{6}{15}$ " " 43c., "			1,094	09
"	9.	" 50 do. 2,558$\frac{4}{15}$ " " 43c., "			1,100	05
"	14.	" 50 do. 2,524$\frac{4}{15}$ " " 43c., "			1,085	43
"	18.	" 50 do. 2,542$\frac{10}{15}$ " " 43c., "			1,093	35
"	28.	" 50 do. 2,582 " " 43c., "			1,110	26
June	1.	" 50 do. 2,549$\frac{9}{15}$ " " 43c., "			1,096	33
"	11.	" 50 do. 2,562$\frac{4}{15}$ " " 43c., "			1,101	77
"	12.	" 50 do. 2,532$\frac{12}{15}$ " " 43c., "			1,089	10
"	19.	" 50 do. 2,555$\frac{11}{15}$ " " 43c., "			1,098	97
"	22.	" 50 do. 2,526$\frac{10}{15}$ " " 43c., "			1,086	47
"	28.	" 50 do. 2,524$\frac{2}{15}$ " " 43c., "			1,085	38
July	3.	" 50 do. 2,540$\frac{8}{15}$ " " 43c., "			1,092	43
"	9.	" 50 do. 2,562$\frac{2}{15}$ " " 43c., "			1,101	72
"	16.	" 52 do. 2,621$\frac{13}{15}$ " " 43c., "			1,127	40

13 The defendants are entitled to the following credits:

Jan. 11.	By sight draft to settle							$1,098 97
" 17.	By sight draft to settle							1,115 53
" 25.	By sight draft to settle							1,106 48
" 31.	By sight draft to settle							1,083 71
Feb. 9.	By sight draft to settle							1,106 19
" 14.	By sight draft to settle							1,329 49
" 21.	By sight draft to settle							1,103 60
M'ch 20.	By net proceeds	50	bbls.	oil	sold in	N. Y.	market	1,013 55
Apr. 4.	" " "	100	"	"	do.			1,986 89
" 15.	" " "	50	"	"	do.			1,005 63
" 18.	" " "	100	"	"	do.			1,994 11
June 5.	" " "	110	"	"	do.			2,025 89
" 10.	" " "	99	"	"	do.			1,826 52
" 17.	" " "	100	"	"	do.			1,826 17
Aug. 6.	" " "	250	"	"	do.			3,636 87
" 7 & 8.	" " "	352	"	"	do.			5,138 22

STATE OF NORTH CAROLINA, *County of Edgecombe,* } *ss:*

Before me, a notary public in and for said county, came the above-named Henry K. Nash, Jr., by me known to be the secretary of The Tarboro' Oil Mills, the plaintiff in the foregoing case, and, being by me first duly sworn, says that the facts set forth in the foregoing declaration and statement of demand are true, to the best of his knowledge and belief.

H. K. NASH, JR.,
Sec. T. O. Mills.

Sworn to and subscribed before me this 8th day of October, 1889.

F. P. CHESHIRE,
[L. S.] *Notary Public.*

Filed Oct. 12, 1889.

H. D. GAMBLE, *Cl'k.*

14 (*Summons.*)

UNITED STATES, *Western District of Pennsylvania,* } *sct:*

The President of the United States to the marshal of the western district of Pennsylvania, Greeting:

We command you that you summon William M. Harrison and John A. Gamble, partners, doing business as the South Side Refining Company, citizens of Williamsport, in the county of Lycoming and Commonwealth of Pennsylvania, late of your district, if they may be found therein, so that they be and appear before the judges

of the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit, at a session of the same court to be holden at Pittsburgh on the second Monday of November next, to answer the Tarboro' Oil Mills, a corporation and citizen of the State of North Carolina, doing business in the county of Edgecombe, State aforesaid, in an action of assumpsit.

And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Pittsburgh, this 12th [L. S.] day of October, A. D. 1889, and in the 114th year of the Independence of the said United States.

H. D. GAMBLE, *Clerk.*

15 October 22nd, 1889, served on William M. Harrison and John A. Gamble, partners, doing business as the South Side Refining Company, personally by exhibiting to them the within summons and making known to them the contents and delivering to each a true copy. Same day delivered to each a copy of plaintiff's statement and claim at Williamsport, Lycoming county, Penna.

"So ans."—

GEO. W. MILLER,
U. S. Marshal, W. D. of Penna.,
Per SIMON YEAGER, *Deputy.*

Marshal, $17.60.

(*Præcipe for Appearance for Def't.*)

Circuit C't U. S.

THE TARBORO' OIL MILLS
vs.
WM. M. HARRISON *et al.*
} No. 24, Nov. Term, 1889.

And now, Nov. 2, 1889, we appear for defendants, reserving all exceptions.

H. C. & S. T. McCORMICK, *Att'ys, &c.*

To H. D. Gamble, Esq., clerk.

Filed Nov. 4, 1889.

H. D. GAMBLE, *Cl'k.*

16 (*Affidavit of Defence.*)

In the Circuit Court of the United States for the Western District of Pennsylvania.

THE TARBORO' OIL MILLS, a Corporation of the State of North Carolina,
vs.
WILLIAM M. HARRISON and JOHN A. GAMBLE, Doing Business as the South Side Refining Company.
} No. 24, November Term, 1889, at Pittsburgh.

STATE OF PENNSYLVANIA, *Lycoming County*, } *ss*:

William M. Harrison, one of the defendants above named, on behalf of himself and his copartner, doing business as the South Side Refining Company, being duly sworn according to law, deposes and says that the above-named defendants have a just and legal defence to the whole of the plaintiff's claim in the above-entitled case, the nature and character of which is as follows:

That on October 30, 1888, the defendants received from the plaintiffs the following telegram:

"TARBORO', N. C., *October* 30, 1888.

To South Side Refining Co.:

Will send you one hundred barrels each of November, December, and January prime crude, 40 cents, f. o. b. here. Freight to Williamsport, 37 cents per hundred pounds. Answer.

(Signed) TARBORO' OIL MILLS."

In reply to the telegram above received defendants sent the following telegram to plaintiffs:

"Message received. Offer accepted. Ship fifty semi-monthly. Confirm."

17 In response to the last-mentioned telegram defendants received from plaintiffs, November 1st, 1888, the following telegram:

"Telegram received. We enter sale 300 barrels. Shipment 50-barrel lots as requested."

That pending the delivery to the defendants of the three hundred barrels of prime crude cotton-seed oil, to wit, on December 3, 1888, defendants enlarged the purchase from plaintiffs, so that they became the purchasers of the season's run of oil, to be shipped in fifty-barrel lots, at forty-three cents per gallon, as stated in the letter from H. K. Nash, secretary of the South Side Refining Co., dated December 3, 1888, and fully set forth in plaintiffs' statement.

That the purchase made by the defendants from the plaintiffs was

for prime crude cotton-seed oil, and the price to be paid was the full price of prime crude cotton-seed oil.

That several shipments of fifty-barrel lots were made by plaintiffs to defendants and paid for by defendants upon delivery, when the defendants discovered that the oil so shipped to them was of inferior quality and not of the quality which the said plaintiffs had contracted to deliver to the defendants.

That, after making repeated complaints to the said plaintiffs of the quality of the oil and having received in writing from the said plaintiffs a promise that the oil shipped later would be of the kind purchased, the defendants continued to receive the shipments of said oil upon the faith of said promise down to about March, 1889,
when the defendants refused to receive further shipments of
18 the inferior oil above mentioned, having paid for all oil theretofore shipped.

That on March 5, 1889, the defendants received a consignment from plaintiffs of sixty barrels of oil, containing three thousand one hundred and ten gallons, which consignment is the only oil received by them from plaintiffs that has not been paid for by payment of draft accompanying the bill of lading.

That the said last-mentioned consignment was of the same inferior quality, and defendants refused to receive any further shipments of oil of that quality, but have at all times been willing to accept the quality of oil purchased by them and pay for it at the price agreed; and deponent further avers that, notwithstanding the inferior quality of the said oil, the defendants offered, in March, 1889, to pay for the said oil at its true value if the plaintiffs would allow a credit for the overpayment on previous shipments to such an amount as would make the price according to the quality, all of which plaintiffs declined to do.

That the value of the oil actually received by the defendants did not exceed the sum of forty cents per gallon at the time when the said contract was made, and at or about the time the last shipment was received by defendants, to wit, on or about March 5th, 1889, defendants offered to pay for all the oil so received by them the said sum of forty cents per gallon, and that the indebtedness of the defendants to the plaintiffs upon this basis was the sum of six hundred and ninety dollars and eighteen cents, which sum the defendants offered to pay the plaintiffs, not because of any legal liability therefor, but because such sum was the full value of all the oils
19 received by defendants from plaintiffs.

That deponent is advised by his counsel and verily believes that by reason of the failure on the part of the plaintiffs to comply with the terms of its contract there is no legal liability whatever upon the part of the defendants to the plaintiffs, and that the defendants were not obliged to receive and pay for a quality of oil widely different and costing them a much larger sum to refine than that purchased by them from the said plaintiffs.

And deponent further saith that, the defendants being under no legal obligation to receive and pay for oil materially differing in quality from that which was purchased, the plaintiffs cannot, as is

claimed by them in this case, sell such inferior oil at a less price and then charge the defendants with the difference between the price so received by the plaintiffs and the price agreed by defendants to be paid for "prime crude oil."

Deponent therefore saith that the defendants are in nowise indebted to the plaintiffs in the amount sued for or in any other amount whatsoever, all of which they expect to be able to prove upon trial of the above-entitled case.

WILLIAM M. HARRISON.

STATE OF PENNSYLVANIA, *County of Lycoming,* } *ss:*

William M. Harrison, being duly sworn according to law, deposes and says that he is a member of the South Side Refining Company, a firm doing business in the city of Williamsport and State aforesaid, and that the facts set forth in the foregoing affidavit of defense are true to the best of his knowledge and belief.

WILLIAM M. HARRISON.

20 Sworn to and subscribed before me this seventh day of November, 1889.

SETH T. McCORMICK,
[L. S.] *Notary Public.*

Filed Nov. 9, 1889.

H. D. GAMBLE, *Clerk.*

(*Rule for Judgment.*)

In the Circuit Court of the United States, Western District of Pennsylvania.

THE TARBORO' OIL MILLS
vs.
THE SOUTH SIDE REFINING CO. } No. 34, November Term, 1889.

And now, to wit, November 13th, 1889, the plaintiffs' counsel in the above case move the court for a rule upon the defendants to show cause why judgment should not be entered against them for want of sufficient affidavit of defense for the following reasons:

1st. The affidavit of defense does not set forth facts sufficient in law to sustain the defense to plaintiffs' claim.

2nd. The affidavit of defense is evasive and does not directly deny any material allegations of plaintiffs in their affidavit of claim.

21 3rd. The defendants, in stating that they had received from the plaintiffs a promise in writing that the oil shipped later would be of the kind purchased, do not, as they should have done, give the date and terms of said alleged promise.

4th. Defendants do not deny the terms of the contract, as set up

in the plaintiffs' claim, but seem evasively to set up some other contract, without alleging its terms or date.

Rule granted, returnable in ten days.

BY THE COURT.

Filed Nov. 13, 1889.

H. D. GAMBLE, *Clerk.*

(*Rule to Show Cause and Acceptance of Service.*)

In the Circuit Court of the United States, Western District of Pennsylvania.

THE TARBORO' OIL MILLS
vs.
THE SOUTH SIDE REFINING CO. } No. 24, of November Term, 1889.

And now, to wit, November —, 1889, the plaintiff's coun-
22 sel in the above case move the court for a rule upon the defendants to show cause why judgment should not be entered against them for want of sufficient affidavit of defense for the following reasons:

1st. The affidavit of defense does not set forth facts sufficient in law to sustain the defense to plaintiffs' claim.

2nd. The affidavit of defense is evasive and does not directly deny any material allegations of plaintiffs in their affidavit of claim.

3rd. The defendants in stating that they had received from the plaintiffs a promise in writing that the oil shipped later would be of the kind purchased do not, as they should have done, give the days and terms of said alleged promise.

4th. Defendants do not deny the terms of the contract as set up in the plaintiffs' claim, but seem evasively to set up some other contract without alleging its terms or date.

Rule granted, returnable in ten days.

BY THE COURT.

Nov. 19, 1889.—I accept notice of this rule.

H. C. McCORMICK,
Att'y for Def'ts.

Filed Nov. 23, 1889.

H. D. GAMBLE, *Clerk.*

23 (*Letter Referred to in Defendant's Affidavit of Defense and Made Part Thereof.*)

(Copy.)

OFFICE OF TARBORO' OIL MILLS,
TARBORO', N. C., *Jan'y* 23, 1889.

DEAR SIRS: In regard to our oil it is, as I suppose, on ac. of the quality of the seed. All of the earlier crop was picked green, and the seed was not as dry as they usually are, but the later runs will,

I think, be better. I have heard the same complaint from other mills. Our machinery and process is the same as last year, and the oil should be as good unless the reason above assigned is the correct one.

Yours truly,

H. K. NASH, JR.
Sec'y and Manager.

A true copy.

H. C. McCORMICK,
Att'y for Def'ts.

And now, January 13, 1890, leave is granted defendants to file as part of their affidavit of defence the above copy of letter of Jan'y 23, 1889, the plaintiff's promise in writing referred to in the affidavit of defence.

BY THE COURT.

Filed by leave of court this 13th day of January, 1890.
H. D. GAMBLE, *Clerk.*

24 (*Supplemental Affidavit of Defence.*)

In the Circuit Court of the United States for the Western District of Pennsylvania.

THE TARBORO' OIL MILLS, a Corporation of the State of North Carolina,
vs.
WILLIAM M. HARRISON and JOHN A. GAMBLE, Doing Business as the South Side Refining Co.
No. 24, November Term, 1889.

STATE OF PENNSYLVANIA, *County of Lycoming*, } *ss:*

William M. Harrison, one of the defendants above named, on behalf of himself and his copartner, doing business as the South Side Refining Company, being duly sworn according to law, deposes and says (supplementary to the affidavit of defence already filed):

First. That "prime crude cotton-seed oil" is a brand of oil well known to the trade, and that to be of such brand and quality it must be made from decorticated seed and must be sweet in flavor and odor and free from water and settlings.

Second. That the quality of oil purchased by defendants from plaintiffs and the price contracted to be paid required the delivery of "prime crude cotton-seed oil," but instead thereof and in violation of said contract the oil delivered by plaintiffs to defendants was not sweet in flavor and odor and was not free from settlings; that by reason of the inferior quality of said oil a large additional
25 expense was entailed upon defendants in refining the same, it being necessary to refine the said oil twice in order to obtain a marketable oil, and that the product of refined oil from the

inferior crude so received as aforesaid was about five per centum less than it would have been had the article furnished by plaintiffs been prime crude cotton-seed oil, and that the additional cost as aforesaid of refining by reason of the defective quality of the crude was, as nearly as deponent is informed and believes, about the sum of fifty cents per barrel; and deponent further says that the sale of the finished refined product from such inferior oil is difficult for any purpose except illuminating, necessitating the receipt of a much less price for same; and deponent further says that the plaintiffs well understood that the oil to be furnished under their said contract was to be "prime crude cotton-seed oil," and in each and every bill rendered when shipments were made of the oil it was described in such bill as "prime crude cotton-seed oil."

Third. Deponent further says that by the bill of particulars filed by the plaintiff- in the above-entitled case it appears that the oil claimed to have been sold by the plaintiffs from March 20, 1889, to August 8, 1889, yielded an average price in the New York market of $33\frac{1}{10}\frac{3}{0}$ cents per gallon, whilst the average market price for the same time in the New York market deponent finds was $38\frac{1}{2}$ cents per gallon for prime crude cotton-seed oil; that the freight and drayage from Tarboro', North Carolina, to the city of New York does not exceed two cents per gallon, and that the commis-
26 sions or brokerage would not exceed $\frac{1}{2}$ cents per gallon, making the entire deductions from said average price of $38\frac{1}{2}$ cents per gallon not in excess of $2\frac{1}{2}$ cents per gallon, leaving 36 cents per gallon as the price that should have been received by plaintiffs for the oil so sold in the said oil market of the quality contracted to be sold to defendants, to wit, prime crude cotton-seed oil.

Fourth. And deponent further saith that the statement of the plaintiffs filed in the above-entitled case is wholly insufficient, as it appears by its own terms that the entire correspondence leading up to the contract upon which suit is brought is not given, it appearing from plaintiffs' own statement that the letter from plaintiffs to defendants dated December 3, 1888, was in answer to a letter from defendants to plaintiffs, "inquiring on what terms plaintiffs would contract with them for the remainder of its season's run of oil;" and, further, that the statement signed by plaintiffs differs materially from the bill of particulars attached thereto.

WILLIAM M. HARRISON.

Sworn to and subscribed before me Jan'y 14, 1890.
[L. S.] SETH T. McCORMICK.

And now, Jan'y 15th, 1890, on motion of counsel for defendants, the court grants defendants leave to file the within supplemental affidavit of defence, but upon condition that the plaintiff shall have the right to file as part of its statement of claim a copy, verified by affidavit, of the defendants' letter to which the plaintiff's letter of December 3, 1888, was an answer.

BY THE COURT.

Filed Jan'y 15, 1890.

H. D. GAMBLE, *Clerk.*

27 (*Supplemental Affidavit of Plaintiff.*)

In the Circuit Court of the United States, Western District of Pennsylvania.

TARBORO' OIL MILLS
vs.
SOUTH SIDE REFINING COMPANY. } No. 24, November Term, 1889.

STATE OF NORTH CAROLINA, }
County of Edgecombe, } *ss:*

Before me, a notary public in and for said county, comes Henry K. Nash, Jr., who, being by me first duly sworn, says that he is the secretary and general manager of The Tarboro' Oil Mills, plaintiff in the above case, and that on November the 19th, 1888, nearly two weeks after the delivery of 300 barrels had begun, plaintiff wrote the defendants the letter a copy of which is hereto attached and marked Exhibit A, and in due course of mail received from defendants an answer, being the letter of which a copy is hereto attached and marked Exhibit B, and which is the letter referred to as of recent date in the letter from plaintiff to defendant-, dated December 3, 1888, set forth in the original affidavit of claim.

H. K. NASH, JR.

Sworn and subscribed before me this 30th day of January, A. D 1890.

[L. S.] F. P. CHESHIRE,
Notary Public.

28 EXHIBIT "A."

TARBORO', N. C., *Nov. 19th,* 1888.

South Side Refining Co., Williamsport, Pa.

DEAR SIRS: We had the misfortune to break one of our oil presses this morning and may have some trouble in filling our contract with you.

We will have to get along the best we can with one press until we can have the broken one repaired, which we trust will not be over ten or twelve days. We have no doubt but that we can fill the contract for three hundred barrels by February 1st, but we may have some trouble in getting your November 50 barrels. You must be lenient with us.

Yours truly,
(Signed) TARBORO' OIL MILLS.

EXHIBIT "B."

WILLIAMSPORT, PA., *Nov.* 21, 1888.

Tarboro' Oil Mills.

GENTLEMEN: We note your letter of the 19th inst. and, although we have made our arrangements with reference to existing contracts for crude oil, still we are certainly disposed to make reasonable allowance under such circumstances as you indicate. We have been anticipating a letter from you agreeable to promise in regard
29 to further supply for the season. Mr. F. S. Roister wrote us to this effect from Richmond.

Yours truly, SOUTH SIDE REFINING CO.

And now, Febr. 1, 1890, leave is granted the plaintiff to file the within affidavit and annexed exhibits as part of the plaintiff's statement of claim.

BY THE COURT.

Filed Feb'y 1, 1890.

H. D. GAMBLE, *Clerk.*

(*Opinion of the Court and Order.*)

THE TARBORO' OIL MILLS
vs.
THE SOUTH SIDE REFINING COMPANY. } No. 24, Nov'r Term, 1889.

Sur-rule for judgment against the defendants for want of a sufficient affidavit of defence.

Per Curiam:

Neither the original nor the supplemental affidavit of defence denies the terms of the contract as set forth in the plaintiff's statement of claim. Those terms are contained in the written correspondence between the parties, copies of which accompany
30 the plaintiff's said statement. To that correspondence, then, resort must be had to determine the obligations and rights of the parties.

We do not concur in the view that the terms of the prior contract for the 300 bbls. of oil are to be imported into the contract sued on. The two contracts are distinct and independent of each other.

The plaintiff's offer as embodied in the letter of December 3, 1888, was not to sell oil of any specified quality; neither was the defendants' acceptance of that offer coupled with any condition as to quality; the subject-matter of the contract was simply the "season's run of oil." Under the authorities, it seems to us quite plain that there was here no warranty, expressed or implied, as to quality. So long as the plaintiff manufactured fairly and observed good faith the defendants were bound to accept the plaintiff's output of oil for the balance of the season.

In the absence of any denial of the terms of the contract as set forth in the plaintiff's statement, or of a counter-statement of what the actual terms of the contract were, the general averments in the affidavits of defence that the purchase made by the defendants from the plaintiff was of prime crude cotton-seed oil, and that the oil shipped by the plaintiff to the defendants was not of the quality which the plaintiff had contracted to deliver, but was of an inferior quality, amount to nothing more than affirmations of mere legal conclusions and are unavailing.

Marsh *v.* Marshall, 53 Pa. St., 396.
Peck *v.* Jones, 70 *id.*, 83.
Erie City *v.* Butler, 120 *id.*, 374.

31 The plaintiff's letter of January 23, 1889, which the defendants by amendment made part of their original affidavit of defence, completely disposes of the averment that the defendants received a promise in writing from the plaintiff that the oil shipped later would be of the kind purchased.

The averment in the supplemental affidavit of defence "that the statement signed by the plaintiff differs materially from the bill of particulars attached thereto" should have been more specific. However, at the argument it was asserted by the defendants' counsel that the real difference between the debit items and the credit items in the bill of particulars was $7,472.38 and not $7,562.43, as set out in the body of the statement, and doubtless this is what is meant by the above-quoted averment; but if there is any mistake in the computation it will be rectified in assessing the plaintiff's damages. All the elements for correct computation of the amount due the plaintiff are furnished by the plaintiff's statement of claim and annexed bill of particulars, and here it may be added that the correctness of this bill of particulars is not questioned by anything contained in the 3rd paragraph of the supplemental affidavit of defence, for it throughout is based upon the defendants' unfounded assumption that the contract in suit required the delivery of prime crude cotton-seed oil.

Upon the whole, the court is of opinion that the affidavits of defence are insufficient to prevent judgment.

And now, Feb'y 4, 1890, the *the* rule to show cause why judgment should not be entered against the defendants for want of a
32 sufficient affidavit of defence is made absolute, and it is ordered that the amount due the plaintiff be ascertained by the clerk *sec. reg.*, as per the plaintiff's statement of claim and attached bill of particulars, and that judgment for the same be entered in favor of the plaintiff.

BY THE COURT.

Filed Feb'y 4, 1890.

H. D. GAMBLE, *Clerk.*

(*Præcipe for Writ of Error.*)

In the Circuit Court of the United States, Western District of Pennsylvania.

TARBORO' OIL MILLS
vs.
WM. M. HARRISON and JNO. A. GAMBLE, Doing Business as South Side Refining Company.

No. 24, Nov. Term, 1889.

To H. D. Gamble, clerk:

Please issue writ of error (on behalf of defendants above named, who are plaintiffs in error) from the Supreme Court of the United States, returnable to next return day for writs of error.

H. C. & S. T. McCORMICK,
Att'ys for Pl'ffs in Error.

M'ch 6, 1890.

NOTE.—Bond herewith inclosed as a supersedeas, which clerk is asked to have approved by the court, the sureties having justified before U. S. commissioner.

Filed March 24, 1890.

H. D. GAMBLE, *Clerk.*

33 (*Bond on Writ of Error.*)

Know all men by these presents that we, William M. Harrison and John A. Gamble, principals, and John M. Young and Albert D. Hermance, sureties, are held and firmly bound unto The Tarboro' Oil Mills, a corporation of the State of North Carolina, in the full and just sum of fifteen thousand nine hundred and fifty and $\frac{10}{100}$ dollars, to be paid to the said The Tarboro' Oil Mills, its certain attorney or assigns; to which payment, well and truly to be made, we bond ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of February, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a circuit court of the United States in and for the western district of Pennsylvania, in a suit depending in said court between The Tarboro' Oil Mills, a corporation of the State of North Carolina, and William M. Harrison and John A. Gamble, doing business as The South Side Refining Company, the said The Tarboro' Oil Mills being the plaintiff and the said William M. Harrison and John A. Gamble being the defendants, a judgment was rendered against the said William M. Harrison and John A. Gamble, defendants, and the said William M. Harrison and John A. Gamble having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Tarboro' Oil

Mills, citing and admonishing them to be and appear at a
34 Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said William M. Harrison and John A. Gamble shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

WM. M. HARRISON. [SEAL.]
JOHN A. GAMBLE. [SEAL.]
JOHN M. YOUNG. [SEAL.]
ALBERT D. HERMANCE. [S.]

Sealed and delivered in presence of (the words "executors," "administrators," and "eighty" erased and the word "ninety" inserted before execution)—
SETH T. McCORMICK.
HARRY S. KNIGHT.

Approved by—

M. W. ACHESON, *Judge.*

March 24, 1890.

UNITED STATES OF AMERICA, *Western District of Pennsylvania,* } ss:

John M. Young and Albert D. Hermance, being duly affirmed, depose and say and each for himself saith that he is worth $16,000 over and above all just debts and liabilities and exemptions.

JOHN M. YOUNG.
ALBERT D. HERMANCE.

Affirmed and subscribed to this 3rd day of March, 1890, before me—

B. S. BENTLEY,
[L. S.] *U. S. Commissioner, West. Dist. Pa.*

Filed March 24, 1890.

H. D. GAMBLE, *Cl'k.*

35 In the Circuit Court of the United States for the Western District of Pennsylvania.

TARBORO' OIL MILLS *vs.* SOUTH SIDE REFINING CO. } No. 24, Nov. Term, 1890.

WESTERN DISTRICT OF PENNSYLVANIA, ss:

Seal of the U. S. Circuit Court, W. D. Penna.

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true

copy of the record and proceedings in the above-entitled case, so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 14th day of April, A. D. 1890.

H. D. GAMBLE, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, Marcus W. Acheson, judge presiding in the United States circuit court for said district, do hereby certify that H. D. Gamble above named was at the time of making the above certificate and is now clerk of the said court, and that the said certificate made by him is in due form of law.

M. W. ACHESON,
Judge Holding U. S. Circuit Court.

Pittsburgh, April 14th, 1890.

36 In Circuit Court U. S., West'n Dist. Penna.

THE TARBORO' OIL MILLS
vs.
WM. M. HARRISON and JOHN A. GAMBLE, Doing Business as the South Side Refining Company.
In Error. No. 24, Nov. Term, 1889.

Of —— term, 1890 (Supreme Court).

Afterwards, to wit, on the 4th day of April, 1890, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come Wm. M. Harrison and John A. Gamble, doing business as the South Side Refining Company, by Henry C. McCormick, their attorney, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit:

First. The court erred in granting the rule to show cause why judgment should not be entered against the defendant for want of a sufficient affidavit of defense.

Second. The court erred in making the order of February 4, 1890, which order is in words following: "And now, February 4, 1890, the rule to show cause why judgment should not be entered against the defendant for want of a sufficient affidavit of defense is made absolute, and it is ordered that the amount due the plaintiff be ascertained by the clerk, *sec. reg.*, as per the plaintiff's statement of claim and attached bill of particulars, and that judgment for the same be entered in favor of plaintiff."

37 Third. The court erred in entering judgment against the defendants.

Fourth. The suit in this case being for unliquidated damages for breach of an alleged contract, as shown by plaintiff's declaration,

the court erred in holding that the act of General Assembly of Pennsylvania entitled "An act providing for the abolition of the distinctions heretofore existing between actions *ex contractu* and actions *ex delicto* so far as relates to procedure, and providing for two forms of action and regulating the proceedings thereunder," approved May 25, 1887, required an affidavit of defense in this case.

Fifth. The declaration in this case showing, as it does, that the contract sued upon was for the delivery by the plaintiffs to the defendants of the "season's run of prime crude cotton-seed oil," and it being explicitly denied by the affidavit of defense that the oil delivered was "prime crude cotton-seed oil," but a greatly inferior article, the court erred in holding that the affidavit of defense was insufficient to prevent judgment.

Sixth. The court erred in not discharging the rule granted to show cause why judgment should not be entered for want of sufficient affidavit of defense.

And, further, there is also error, in this: that by the record aforesaid it appears that the judgment aforesaid given was given for the said Tarboro' Oil Mills against the said Wm. M. Harrssson and John A. Gamble, doing business as aforesaid, whereas by the law of the land the said judgment ought to have been given that the said
38 rule for judgment be discharged. And the said Wm. M. Harrison and John A. Gamble, doing business as aforesaid, pray that the judgment aforesaid may be reversed, and nulled, and altogether held for nothing, and that they may be restorted to all things which they have lost by occasion of the said judgment, etc.

HENRY C. McCORMICK,
Attorney for Wm. M. Harrison and Jno. A. Gamble,
Plaintiffs in Error.

[Endorsed:] Assignments of error.

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The Tarboro' Oil Mills, a corporation of the State of North Carolina, plaintiff, and William M. Harrison and John A. Gamble, doing business as the South Side Refining Company, defendants, a manifest error hath happened, to the great damage of the said William M. Harrison and John A. Gamble, doing business as The South Side Refining Company, defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the

second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the U. S. Circuit Court, W. D. Penna.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 24th day of March, in the year of our Lord one thousand eight hundred and ninety.

H. D. GAMBLE,
Clerk of the Circuit Court of the United States.

Allowed by—
M. W. ACHESON, *Judge.*

[Endorsed:] Filed March 24, 1890. H. D. Gamble, cl'k.

40 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Tarboro' Oil Mills, a corporation of the State of North Carolina, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Pennsylvania, wherein William M. Harrison and John A. Gamble, doing business as the South Side Refining Company, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal of the U. S. Circuit Court, W. D. Penna.

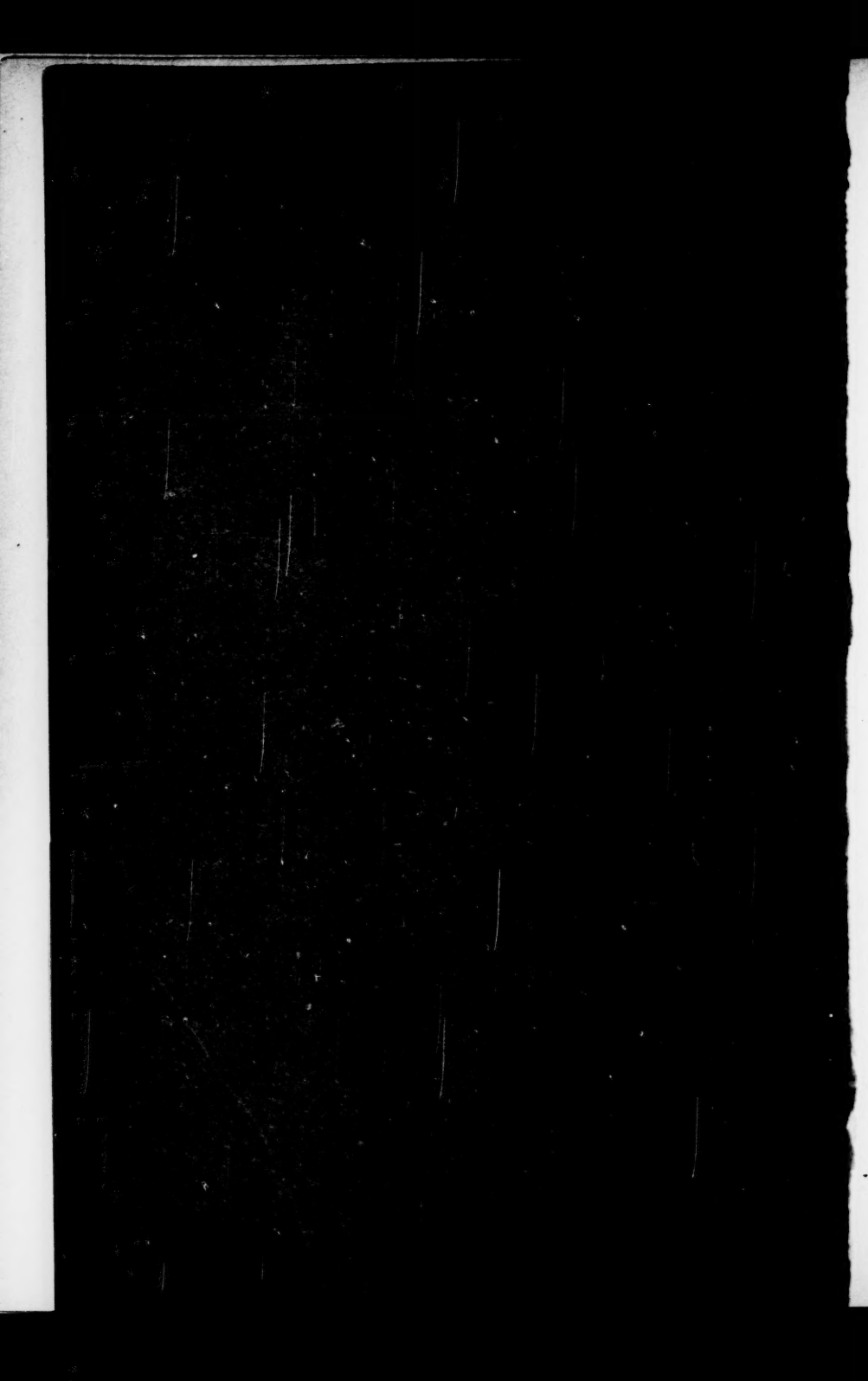
Witness the Honorable M. W. Acheson, a judge of the circuit court of the United States, this 24th day of March, in the year of our Lord one thousand eight hundred and ninety.

M. W. ACHESON, *Judge.*

Attest:
H. D. GAMBLE, *Clerk.*

[Endorsed:] Citation. Original. Served on us March 25th, 1890. H. & G. C. Burgwin, attorneys for Tarboro' Oil Mills. Filed March 24, 1890. H. D. Gamble, clerk.

Endorsed on cover: Case No. 14,019. W. Pennsylvania C. C. U. S. No. 336. William M. Harrison and John A. Gamble, doing business as the South Side Refining Company, plaintiffs in error, *vs.* The Tarboro' Oil Mills. Filed April 22, 1890.



IN THE SUPREME COURT

OF THE

UNITED STATES.

THE HARTFORD FIRE INSURANCE COMPANY ET AL.,
Petitioners,

vs.

THE BONNER MERCANTILE COMPANY,
Respondent.

To the Honorable, the Supreme Court of the United States:

The petition of the Hartford Fire Insurance Company *et al.* respectfully shows:

That heretofore on, to wit, April 9th, 1890, a suit in equity was commenced in the Circuit Court of the United States, of the Ninth Circuit, in and for the District of Montana, by your petitioners, seventeen of the largest and most responsible fire insurance companies in the United States, against the Bonner Mercantile Company, a corporation, the object of which said suit was to obtain a decree vacating and annulling a certain award theretofore rendered upon a submission entered into between the parties, legal proceedings for the enforcement of which said award were threatened by said Bonner Mercantile Company; that subsequent to the filing of said bill of complaint the respondent appeared and filed its demurrer to said bill; that said demurrer was overruled,

whereupon respondent filed its answer, which answer was thereafter amended upon exceptions allowed; that subsequent to answer filed depositions were taken, and upon such depositions and exhibits accompanying same the cause was argued and submitted, and thereafter, and on, to wit, June 20th, 1892, the Circuit Court made and entered its decree adjudging that the award to set aside which said suit had been brought was valid, and dismissing the suit as to certain of your petitioners, upon the ground that as to said petitioners the Circuit Court was without jurisdiction. The Court did not make findings, nor file an opinion, and neither counsel nor the Court of Appeals is advised upon what ground or grounds the conclusions reached by the Court are based.

That subsequent to the entry of the decree of the Circuit Court petitioners appealed therefrom to the Honorable The United States Circuit Court of Appeals for the Ninth Circuit; that the said cause came on regularly to be heard before said Court of Appeals, and such proceedings were had therein that on to wit: May 18th, 1893, the said Court rendered its judgment reversing the decree of the Circuit Court in so far as in and by said decree it was adjudged that the Court was without jurisdiction as to certain of your petitioners, and that the bill of complaint should be dismissed as to said petitioners, but affirmed the said decree in so far as in and by the same it was adjudged that the award to vacate and annul which said suit was brought was valid.

That subsequent to the decision of the Court of Appeals, as hereinbefore stated, petitioners duly filed in said Court their petition for rehearing; the said Court there-

after considered said petition, but upon, to wit, August 15th, 1893, entered an order denying the same, whereupon, on motion of counsel for your petitioners, the said Court ordered a stay of its mandate in said cause until October 15th, 1893.

And now your petitioners respectfully represent to this Honorable Court that in the rendition of said judgment in the Circuit Court, the affirmance thereof in the United States Circuit Court of Appeals, and the denial of your petitioners' petition for rehearing in said Court of Appeals, manifest error hath happened, to the great damage of your petitioners, in this: that under and pursuant to the decree of the Circuit Court, as affirmed by the Court of Appeals, an award, under and pursuant to which your petitioners will be called upon and compellable to pay to respondent $60,624.73, is adjudged to be a good and valid award, whereas upon the facts proven, as found by said Circuit Court of Appeals, the said award should be set aside and annulled, and declared of no force or effect whatever.

And your petitioners further respectfully represent that this is a case in which, under the act of Congress creating Circuit Courts of Appeals, *certiorari* should issue, in that it is a case of gravity and importance within the meaning of said Act, and the decisions of this Court construing the same, and in that a consideration by this honorable Court of the question for decision in this cause is necessary to secure uniformity of decision, inasmuch as the decision by said Circuit Court of Appeals is in conflict with other decisions in both the Federal and State courts.

Your petitioners respectfully show that the case is one of

gravity and importance in this: The suit of your petitioners against respondent is brought to obtain a decree vacating an award fixing $60,624.73 as the amount in money of a fire loss suffered by respondent, rendered under a submission entered into between petitioners and respondent, pursuant to the provisions of policies of fire insurance theretofore issued to respondent by petitioners. The attack upon the award is based upon alleged misconduct upon the part of two of the arbitrators who made the award. Under the submission, petitioners appointed an arbitrator, and respondent another, and these two a third, who were to estimate, determine and appraise in detail the amount of loss, *together with* such third person as they should select, such third person as an umpire to determine matters of difference between the two, and *the award of said three persons, or any two of them*, to determine the result. The evidence discloses, and the Court of Appeals in effect finds, that the two arbitrators did not agree, the estimate of one being about $5,000 and the other about $115,000, and that the third man *arbitrarily*, and without the exercise of any judgment upon the facts, adopted an estimate that practically lay midway between the estimates of the other two. The Court further finds that under the submission above recited, the third man was an umpire properly so called, and under no obligation to consult with the other arbitrators, but with full power to render a sole award, and that an award so rendered would be good, although wholly arbitrary and not the result of examination or the exercise of judgment upon the part of the arbitrator so rendering it.

Your petitioners further show that they are engaged in

the business of fire insurance throughout the United States and Territories, and for the purpose of avoiding litigation with persons holding their policies as to the amount of any loss which may be claimed, the correctness of which may not be admitted by petitioners, they have inserted in their policies a provision to the effect that if, after a loss has occurred for which claim is made, a difference of opinion shall exist as to the amount of such loss between the person insured and the insurer, then and in that case the amount of the loss shall be determined by arbitration, and the award pursuant to such arbitration shall be conclusive as to the amount of the loss.

Your petitioners further represent that arbitrations under said or similar provisions in fire insurance policies are of common and constant occurrence throughout all the United States and Territories, and that a correct exposition of the law is of vital interest to your petitioners and all companies engaged in the fire insurance business, and to persons holding policies of fire insurance.

Your petitioners further respectfully show that the case is one in which consideration by this Honorable Court is necessary to secure uniformity of decision, in as much as the decision of the Circuit Court of Appeals is, notwithstanding its affirmance of the decree of the Circuit Court, in conflict with the law as expounded by that Court, in conflict with the law relating to arbitrations and awards, as announced by this Court, and in conflict with the general law in the United States.

And your petitioners being without further remedy in the premises, now respectfully present this their petition, accompanied by a certified copy of the record and the

petition for rehearing in said cause, and pray that a writ of *certiorari* issue out of this Court, directed to the said United States Circuit Court of Appeals for the Ninth Circuit, requiring said Circuit Court of Appeals to certify said case to this Court for its review and determination.

And your petitioners will ever pray, etc.

T. C. VAN NESS,
Of Counsel for Petitioners.

STATE OF CALIFORNIA,)
City and County of San Francisco.) ss.

Henry K. Belden, being duly sworn, deposes and says, that he is one of the managing agents of the Hartford Fire Insurance Company, one of the plaintiffs in the above entitled cause and one of the petitioners herein, for the Pacific Coast States and Territories, and in and for the States of California and Montana; that he has read the foregoing petition and knows the contents thereof, and the same is true of his own knowledge.

Henry K. Belden

Subscribed and sworn to before me, this 20th day of September, 1893.

N. E. W. Smith

Notary Public.

Seal

No. 1034.

IN THE

Supreme Court of the United [illegible]

THE HARTFORD FIRE INSURANCE CO. et als.,
Petitioners,

VS.

THE BONNER MERCANTILE COMPANY,
Respondent.

Brief and Argument for Petitioners.

T. C. VAN NESS,
Of Counsel.

[illegible]

IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1893.

No.

THE HARTFORD FIRE INSURANCE COMPANY ET ALS. (CORPORATIONS),

Petitioners.

vs.

THE BONNER MERCANTILE COMPANY (A CORPORATION),

Respondent.

BRIEF AND ARGUMENT ON BEHALF OF PETITIONERS

The facts in the case, in so far as they are not stated in the opinion of the Court of Appeals, are briefly as follows:

Prior to September 29, 1889, each of the complainants delivered to the defendant its policy of insurance against loss by fire to its stock of goods, while contained in its two-story and basement brick, metal roofed building, situate in Butte City, Montana. The aggregate of the policies issued by complainants was $87,500, in addition to which there was other insurance upon the property,

amounting to $47,500, making the total insurance upon the property on September 29, 1889, $135,000.

On the last mentioned date a fire occurred in Butte City, in the vicinity of, *but not in*, the building in which the insured property was contained; but, during the progress of the fire, water used in extinguishing it was thrown against the building, and a small portion of the water so thrown, and some of the smoke created by the fire, entered the building and damaged the property. In the neighborhood of the window openings there was also a slight fire damage.

The defendant claimed that its loss by reason of the damage thus caused was in excess of $81,000, and it made claim for that amount. Upon examination of the stock the complainants were of the opinion that the damage did not exceed $5,000, and this difference of opinion having arisen it became necessary, pursuant to the policy provisions applicable in such cases, that the *amount* of the damage should be ascertained by arbitration. Thereupon arbitrators were appointed in the manner prescribed in the policies, and subsequently two of them rendered an award, fixing the damage at $60,624.73. It is to set aside this award and to enjoin the defendant from insisting upon it as determinative of the amount of the loss that the suit was brought.

After setting forth the preliminary facts as above stated, the bill charges that by the terms of the submission the amount of the loss was to be estimated, appraised and determined by G. E. Rockwood, Joseph P. Treanor and a third person, to be mutually selected and appointed by said Rockwood and Treanor, to act as an umpire and de-

cide between them in matters of difference only, the award of any two of said arbitrators to determine the amount of the *sound value of* and *damage* to the insured property.

It is further alleged that Rockwood and Treanor appointed one Theodore Schurmeier to act as the third person, or umpire, and that these three persons qualified; that Rockwood and Treanor could not agree, the former insisting that the loss and damage was much greater than it really was, and largely in excess of the amount allowed by Treanor; that the said Rockwood, in so claiming and insisting, did not act upon his own judgment, or by reason of any investigation or examination made by him, but under the direction *and in the interest* of the defendant, and for the purpose, and with the intention, that defendant should receive a larger amount than the true loss; that Schurmeier did not act with Rockwood and Treanor, nor with them appraise, estimate and determine the sound value of and damage to the property, and did not decide any matter of difference between them, but, on the contrary, awaited the completion of the examination and determination by Rockwood and Treanor, and then, having procured from each his particular figures as to the sound value and damage, separated himself away from them, and by himself, and without the advice, counsel or assistance of either of them, proceeded to determine arbitrarily, and without examination of the damaged property, the sound value and damage of the insured property, and in doing so, consulted the bills, invoices, books and inventories of defendant, theretofore procured from the defendant, and then and there in his possession; that he unjustly

the bill of complaint be and the same is hereby dismissed, and that defendant have and recover of the complainants its cost of suit," etc.

Subsequent to the entry of the decree the Court ordered that the preliminary injunction be retained pending complainants' appeal to the Circuit Court of Appeals.

The appeal from the decree of the Circuit Court came on for hearing in the Appellate Court, was duly argued and submitted, and thereafter and on May 18th, 1893, the decree of the lower Court was reversed in so far as it was thereby adjudged that the Court was without jurisdiction as to some of the complainants, but otherwise was affirmed. A petition for rehearing was subsequently denied.

In the opinion filed upon affirming the judgment the Court finds the facts quite fully and fairly and our only attack upon the decision is that upon the facts found the decree sustaining the award should have been reversed.

Stating the facts in the case the Appellate Court says:

"The Hartford Fire Insurance Company united with a number of other insurance companies in bringing a bill to set aside an award of arbitrators, which was made in pursuance of an agreement between the insurance companies and the Bonner Mercantile Company, to determine the amount of loss incurred by the latter on account of a certain fire.

"The property injured by the fire consisted of a large stock of general merchandise, of the value of more than $200,000. The damage was partly from the fire and the water used to extinguish the same, but was chiefly claimed to consist in injury from smoke.

" Under an agreement of arbitration, the terms of which are referred to hereafter, two arbitrators were selected by the respective parties, G. E. Rockwood by the Mercantile Company, and Joseph P. Treanor by the insurance companies.

" These two made selection of A. Schurmeier, of St. Paul, to act as the third party mentioned in the agreement.

" Pending the arrival of Schurmeier, Treanor and Rockwood began the inspection of the stock. Treanor found the smoke damage to be practically nothing, while Rockwood began by estimating such damage at 8 or 10 per cent., but a day or two later, as the examination proceeded, placed his estimate of such damage at an average of about 50 per cent. on the cost of the goods. The evidence would indicate that there was little or no discussion between these two appraisers concerning the estimates thus given. Treanor's testimony is that he frequently, and from the first, called upon his associate to specify wherein the damage claimed by him consisted, and that he often called Rockwood's attention to the fact that the goods claimed by him to be injured, were in fact wholly uninjured, but that Rockwood refused to discuss the points of difference, and answered all arguments by saying, ' We will leave it to the third man.'

" Rockwood, on the other hand, admits that there was no discussion, but attributes that fact to the insulting language and demeanor of Treanor toward him, which he says rendered amicable discussion between them impossible.

" The two appraisers continued in this manner, going

over the stock, and causing their widely divergent estimates to be entered in books of inventory, until the arrival of Schurmeier.

" When Schurmeier arrived, his attention was called to what had been done, and the failure of the two appraisers to agree. He thereupon went over, with Treanor, the goods that had been examined up to date, and then proceeded with both Rockwood and Treanor to examine the remainder of the stock. During the whole of the examination Schurmeier persistently refused to discuss the matters in controversy, or to express an opinion upon the damage to any item of the goods, or upon the opposing claims of the other two, although often called upon by both to decide the points upon which they differed. He allowed them to proceed to the end in the manner in which they had begun. The goods were overhauled. Clerks wrote in books, in separate columns, the cost price, the quantity, the damage estimated by Treanor and the damage estimated by Rockwood.

" During the examination Schumeirer generally stood by and saw the goods. At times he examined them closely, at other times he was paying little or no attention; occasionally he made some memoranda of his own in a small note-book.

" The examination was concluded late upon a Saturday night. Upon the following Monday morning Schurmeier took the books containing the entries of the appraisers to his room at a hotel, and requested that the two appraisers remain within convenient call, and that he have a clerk to assist him, stating that he intended to get through and leave for St. Paul that afternoon. Later in the day he

sent for one more clerk, and still later for four more. With these six clerks he remained in his rooms with locked doors until Wednesday afternoon. He then called in the appraisers and read to them his award. The estimate of the total loss as found by Trainor was $5,000.00. The estimate of Rockwood was, in the aggregate, over $115,000,00. The total award found by Schurmeier was $60,624.75. As soon as the award of Schurmeier was declared by him, the insurance companies, through their representatives, made protest against his method of arriving at his award, and his refusal to discuss the items of the loss with the other arbitrators, and made demand that such discussion and consideration of the elements of the damage be had.

" Schurmeier made no response to the protest of the demand. Rockwood agreed to accept the award of Schurmeier as conclusive, and the same was signed by Schurmeirer and Rockwood as as the award of arbitration.

" The allegations of the bill upon which it is sought to set aside the award, and which are claimed by the appellants to be sustained by the evidence, are in substance the following:

" 1. That the award was excessive, and the actual loss did not exceed $5,000.00.

" 2. That Rockwood, in placing his estimate upon the damage, did not act upon his own judgment, or upon any investigation made by him, but acted under the direction of the defendant, with the intent that the defendant should receive a larger award than was justly due.

" 3. That Schurmeier did not act with Rockwood or

Treanor, or with either of them, in appraising the loss or in deciding any of the matters submitted to arbitration, but that Schurmeier, having obtained the result of the estimation and determination of the others, separated himself from the said arbitrators, and by himself, without the advice, counsel or assistance of said arbitrators, or either of them, proceeded to determine arbitrarily, and without examination of the property, the loss to the same, and arbitrarily and unjustly did determine said loss to be $60,624.75.

" 4. That Rockwood, at the instigation of the defendant, united with said Schurmeier in rendering an award, but that in fact they did not examine into the loss and did not consider the condition of the property at the time of the fire, and did not make proper deduction for depreciation of property saved."

Upon the facts, as just recited, it is held by the Court that: " The determination of the validity of the award must depend upon whether Schurmeier was an umpire to decide points of difference between the arbitrators, or was a third arbitrator to act with the others in arriving at the determination of the loss;" for, says the Court: " If his relation was that of arbitrator, the irregularity of his proceeding was clearly such as to invalidate the award."

The acts of Schurmeier upon which the Court holds that if he is to be considered a third arbitrator his award is void are summarized by the Court, as follows: " He refused to discuss the evidence or to act with the other arbitrators. He separated himself from the others to make his award, in the seclusion of his room, without access to the damaged goods and without other data than the esti-

mates of Rockwood and Treanor and the cost price of the goods. *He evidently arrived at his results by dividing the difference between the two arbitrators.* There is evidence that he occasionally consulted some meagre memoranda of his own, written upon a sheet of paper or upon a pocket note-book. But when the vast number of the items of the stock is considered, and the impossibility of retaining in the memory, unaided by memoranda, a recollection of the extent of the injury, to each parcel of the goods, *it is impossible to arrive at any conclusion other than that Schurmeier arbitrarily adopted an estimate that practically lay midway between the estimates made by Rockwood and Treanor.*" The italics are ours.

It has always been the contention of appellants that Schurmeier, although called an umpire, was, in legal effect, a third arbitrator, and that hence his refusal, as found by this Court, to discuss the evidence or act with the other arbitrators, and his separation from the others, to make his award, in the seclusion of his room, without access to the damaged goods, and *without other data than the estimates of Rockwood and Treanor and the cost price of the goods* was fatal to his award; *and that*, even although it should be held that he was an umpire, properly so called, his award was void because not the result of the exercise of his judgment based upon an examination of the goods, which examination and exercise of judgment are expressly stipulated for in the submission to arbitration.

As we have seen, the Court agrees with us that if Schurmeier is to be considered as a third arbitrator, his award, by reason of the facts stated in the opinion of the

Court, is void. But it holds that under the submission to arbitration he is an umpire, properly so-called, and having reached this conclusion, sustains his arbitrary award, upon the theory, as I understand the opinion, that as he has *decided* the differences between the other arbitrators, his judgment is conclusive, however erroneous it may be, and, it would seem, without regard to whether it is, or is not, the result of examination, or exercise of judgment. I am seriously convinced that the Court is in error in both of the conclusions reached, and as the propositions decided, and particularly the one last stated, are of the gravest importance to those engaged in the business of insurance, I ask the earnest attention of this Court in the consideration of the ensuing argument.

1. The submission to arbitration was to the effect that the amount of the loss was to be "estimated, determined and appraised in detail by G. E. Rockwood and Joseph P. Treanor, together with a third person to be mutually selected and appointed by them, who should act as umpire to decide between them in matters of difference only, and that the said three persons, or any two of them, should a true return and award make, under oath, of the sound value and loss and damage, etc., etc., and that the persons so selected as aforesaid should arrive at the actual cash value as sound and the amount in money of loss or damage actually caused by the fire."

Assuming for the present that Schurmeier was, under the terms of the foregoing submission, an umpire properly so-called, was his haphazard award arrived at as the Court found, "by dividing the difference between the estimates of Treanor and Rockwood," such a one as binds the appellants?

Under the submission the amount of the loss was to be estimated, determined and appraised by Schurmeier acting "together with" Treanor and Rockwood. It is true that he was to *decide* between these two arbitrators in matters of difference only, but his decision was to be based upon, and the result of, his "estimation, determination and appraisal" of the goods, and not a mere arbitrary division of the difference between the two arbitrators. To reach his award in this manner would be, as the Court finds it was, to *divide* the differences between the arbitrators, but, it is respectfully submitted, in no proper sense, to *decide* them. And that such a *decision* as this was not within the contemplation of the parties would seem to follow from the subsequent stipulation of the submission, that "the *said three* persons, or *any two* of them, should a true return and award make, under oath, of the sound value and loss and damage, etc., etc., and should arrive at the actual cash value as sound and the amount in money of loss or damage actually caused by the fire."

It is apparent that the language, "the *said three* persons, *or any two* of them," includes any and every conceivable case in which the umpire would be called upon to unite in the award; and it is equally clear that it is expressly stipulated that any reward returned should, as to the persons uniting in it, be a *true* award, and that those returning such award should "arrive at the *actual* cash value as sound, and the amount in money of loss or damage, *actually* caused by the fire." It would seem from the language used that it was the carefully expressed intention of the parties that the award rendered should not be the result of chance figuring, but that it should truly express the actual loss.

It must be conceded, I think, that the arbitrary division of the difference between the estimates of Treanor and Rockwood was not the return of a true award, and that the result arrived at in this manner cannot be deemed to be the equivalent of a *true* award fixing the *actual* loss caused by the fire. It seems to me that the error into which the Court has fallen is in giving the meaning which it has to the word "*decide*" as used in the submission to arbitration. As I read the opinion, the Court holds that so long as the umpire *stated and awarded* a figure *between* the estimates of the other arbitrators he "decided" the differences between them within the meaning of the submission. This is the only conclusion that can be drawn from the language of the Court, for, after deciding that the award of Schurmeier "was evidently arrived at * * * by dividing the difference between the two arbitrators," and that "it is impossible to arrive at any conclusion other than that Schurmeier arbitrarily adopted an estimate that practically lay midway between the estimates made by Rockwood and Treanor," it says, after reciting the terms of the stipulation, and in passing upon the validity of his award: "Viewed in the light of his duties as umpire, there is nothing proven in the evidence which would invalidate the award made by Schurmeier. There is no doubt that the umpire decided the differences between the arbitrators, and having done so, and his award having met the approval of one of the arbitrators, his judgment is conclusive, however erroneous the Court may be inclined to consider it."

I further respectfully submit that the view which the

Court has taken of the submission clause, as evidenced by the foregoing extracts from the opinion, finds no support either in the pleadings or the cases cited in the opinion.

Upon this point the respondent, in its answer, averred that the examination of the stock was had by Schurmeier and the other arbitrators jointly, and that he met with the other arbitrators and in their presence announced his award, and that afterwards Rockwood agreed with him as to the value of the property and as to the loss and damage to the same, and that thereupon the said Schurmeier and Rockwood requested Treanor to meet with them for the purpose of making and signing an award showing the amount of damage and loss sustained by the defendant, but that Treanor refused to meet or consult with the said Rockwood and Schurmeier, whereupon the said Schurmeier and Rockwood met together and signed the award of which the companies complain. (Trans., pp. 24–5–6.)

In support of the foregoing averments of the answer respondent has throughout, inferentially at least, admitted that the award of Schurmeier must be vacated, if it was, as alleged by appellants, wholly arbitrary and not based upon examination or the exercise of judgment, for, in order to avoid this result, it has alleged, as we have seen, that the award was the result of a full and complete examination in company with the other arbitrators, and after an offer to consult with said other arbitrators and discuss with them the amount to be awarded.

The authorities cited by the Court in support of its opinion (Morse on Arbitration and Award, 164, 197, 293, 316, 320; *Boston Water Power Company* vs. *Gray*, 6 Met., 131; *Pulliam* vs. *Pensoneau*, 33 Ill., 374), do not support the views announced.

It is true that Morse, upon p. 165 (upon p. 164, cited by the Court, there is nothing bearing upon the point discussed) says, "that the process by which arbitrators come to an agreement is of no consequence and cannot be inquired into by the Court," but upon the same page, and immediately below, he says that *they must exercise judicial discretion and judgment.* I find nothing on p. 197 referring to the point decided, and on page 293 the reference is to the case of *Boston Water Power Company* vs. *Gray*, which I shall consider presently. Upon pp. 316, 318 and 320 there is nothing said which will sustain the doctrine announced, that a purely arbitrary award, not based upon evidence taken, or judgment exercised, can be sustained. The broad doctrine laid down by Mr. Morse upon the pages referred to is, that the conclusion of arbitrators based upon evidence taken will not be set aside merely because of an erroneous exercise of judgment. As is said by the author upon p. 316, speaking of arbitrators, "Matters of fact are regarded as peculiarly within the scope of their authority. * * * As intelligent men they judge of the facts and merits finally, *as a jury does:* that their *descretion and judgment* upon all questions of fact or merits are absolutely final, and not subject to review or examination, is a leading principal of the enunciated cases and nearly, though not quite, universally accepted in the law concerning arbitrations."

As I read Mr. Morse he sums up the doctrine of the cases to be that an award will not be set aside because of an *erroneous exercise* of judgment, but will be when the award is wholly the result of caprice and not based upon examination into the facts and the exercise of judgment upon those facts.

In *Boston Water Power Company* vs. *Gray*, 6 Met., 131, all that was decided was that the mistakes of arbitrators or umpires in drawing conclusions of fact from evidence or observation, or in adopting erroneous rules of law or theories of philosophy, are not a legal cause for avoiding their awards. "The class of cases in which the Court will set aside an award," said Chief Justice Shaw in that case, "upon matter not arising out of the submission or award, is, where there is some corruption, partiality or misconduct on the part of the arbitrators, or some fraud or imposition on the part of the party attempting to set up the award, by means of which the arbitrators were deceived or misled. In neither of these cases is the result the deliberate and fair judgment of the judges chosen by the parties; the former is the result of prejudice *uninfluenced by law or fact;* the latter may be a true judgment, but upon a case falsely imposed on them by the fraud of a party. Under this class of cases where the award may be set aside upon matter not arising out of the submission or award, another was stated at the trial; that is, where the arbitrators made a mistake in matter of fact, by which they were led to a false result. This would not extend to a case where the arbitrators *came to a conclusion of fact erroneously upon evidence submitted to, and considered by them, although the party impeaching the award should propose to demonstrate that the inference was wrong. This would be the result of inference and judgment upon facts and circumstances known and understood; therefore, a result which, upon the principles stated must be deemed conclusive.*"

From the foregoing review of the authorities cited by

the Court in support of its conclusion reached in this case, it will appear, I think, that the Court has failed to distinguish between those cases in which an arbitrator has, although exercising his judgment in the decision of the matter submitted to him, drawn an incorrect inference from the facts in evidence, and those cases in which he has not heard evidence, or exercised any judgment at all, but, without any information upon which to base his conclusion, has arbitrarily, and without regard to the right of either party, announced a decision which is in form only an award. In such a case the award will not be sustained. "It seems," says Mr. Morse (Morse Arb. and Award, p. 165), "to be essential that the arbitrators should have exercised some degree of judgment and discretion; *and if it should appear that they have not done so, their award may be rejected.*"

It will be noted that the authorities to which I have referred, and which the Court cites in support of its conclusion in this case, have reference to the awards of arbitrators generally. They do not, I respectfully submit, even remotely sustain the proposition that an umpire, as such, and merely because he is an umpire, can render a wholly arbitrary award, or one not based upon an examination into the facts, or the result of his judgment upon such facts; and that is the precise point decided in this case. The Court holds that an arbitrator, as such, cannot render an award in this manner. Does any such difference exist between the duties to be performed by an arbitrator and those to be performed by an arbitrator, who is, at the same time an umpire, which will permit the latter to do so?

It would seem that an umpire, properly so called, occupies the position of a sole arbitrator. The arbitrators having disagreed, he is to decide the matter of difference between them, but, upon principle, it must be that, before deciding, he is to be put in possession of the facts upon which the claims of the contesting parties rest, and that his discretion upon the facts must be the result of a fair exercise of his judgment. To toss a coin in the air and render an award for one or the other of the parties as it may fall is not to *decide* anything in connection with the controversy. It is true that the parties to the present controversy might have consented to the settlement of their dispute in that manner, but, if they had so intended, it would not have been necessary to have called Mr. Schurmeier all the way from St. Paul to Butte City to toss the coin. Any street urchin could have been obtained who would have performed the service for the pleasure of hearing the jingle of the metal.

I have already referred to the submission clause in support of our contention that Mr. Schurmeier, even if it be held that he was an umpire, was bound to base his estimate upon an examination of the goods, and now pass to the cases, which I think fully sustain the proposition that, as an umpire, or sole arbitrator, he could not bind appellants by a wholly arbitrary award not based upon such examination or resulting from the exercise of judgment.

In *Brown* vs. *Bellows*, 4 Pick., 192, the award discussed was sustained, but the Court, by way of illustration of a case in which an award would be held bad, said: "If they (the arbitrators) had adopted a middle sum without further consideration, and merely because it was

the mean between the sums named by the parties, it would be a different case; *and such an award ought not to be supported.*"

In *Salkeld* vs. *Slater*, 12 Ad. & E., 767, the submission was to arbitrators, and, if they should disagree, to an umpire. Held, that if, upon disagreement, the umpire omits to rehear the witnesses and bases his conclusion upon the evidence taken down by the arbitrators, his award will be set aside. In deciding the case, the Lord Chief Justice said: "It is important to have it understood that the umpire, as well as the arbitrators, ought to hear and see the witnesses." Littledale, J., concurring, said: "The general rule is that an umpire to whom a case is referred by arbitrators must hear the evidence over again."

The facts in that case were very similar to those in the present case, but much stronger in support of the award. The umpire in the case cited based his award upon the evidence taken by the arbitrators, but, in doing so, exercised his judgment and reached a conclusion thereon. In the case in hand, upon the contrary, the umpire had nothing before him but the conclusions of the separate arbitrators, and did not even base his judgment upon those, but took an arbitrary middle cut through them to arrive at what the Court finds to be a wholly arbitrary result.

In *Eads* vs. *Williams* (24 L. J. Chy., 531; De Gex MacNaghten & Gordon's Reps., vol. 4, p. 674), the submission was to referees and an umpire. One of the referees was of the opinion that the value of the land (the point in dispute) was £200, but finding that the

umpire considered it worth £400, concurred in an award for the latter amount, *because he thought it of no use differing.* In deciding the case, the Lord Chancellor said: "That is not a course which referees have a right to pursue, and an award so made was not one by which the persons who had agreed to take the reference was bound; they were entitled to have the unbiased judgment of the two referees, or, if the two could not concur, then the unbiased judgment of the umpire, *not in a loose way, giving an opinion, but dealing judicially with that upon which it had become his duty to decide.*"

In *Luther* vs. *Medbury*, 26 Atlantic Rep., the submission was to two with power to choose a third to act with them in case of differences. One of the arbitrators originally appointed was willing to award $500, the other $1000, and in order to avoid further trouble they agreed to "split the difference" and award $750, which was done. Upon exception taken to the award it was set aside, the Court saying: "The parties to a submission are entitled, under it, to the judgment of the arbitrators, and if the method pursued by them preclude the exercise of their judgment, the parties do not get that for which they have stipulated."

In *Passmore* vs. *Pettitt* (4 Dall., 271), the Court held that when an umpire is chosen by referees he stands in the same position precisely as the referees themselves, both with respect to powers to be exercised and duties to be performed.

An examination of the foregoing authorities, and I have found no case in conflict with the views announced in them, as quoted, will, I think, satisfy the Court that the Court of

Appeals erred in holding that an umpire to decide differences between arbitrators is not to examine the facts and give to the parties litigant the benefit of a fair exercise of judgment upon the facts. Morse upon Arbitration and award; *Boston Water Power Company* vs. *Gray*, and *Pulliam* vs. *Pensoneau*, cited by the Court in support of the contrary doctrine, do not, as I have already suggested, sustain the conclusion reached in this case; in fact, if I may be pardoned for saying so, they do not even give color to it. Upon the other hand, Morse throughout, as I have elsewhere shown, sums up the authorities to the effect that an award must be the result of an examination and judgment, and nowhere intimates that an umpire is, in this particular, subject to any other or different rule than an arbitrator; and it is submitted that, upon principle, there is no reason why he should be. He is one of the judges chosen by the parties to decide those matters as to which the others cannot agree; not, however, to decide whimsically or arbitrarily, but judicially. This is the language of all the cases. As to those particulars in which the other arbitrators cannot agree, he becomes a sole arbitrator or judge, whose award is to be reached in the same manner as with other arbitrators. It should certainly require the clearest evidence that the intention of the parties to a submission is otherwise, before holding that an arbitrator or umpire, or either or both of them, may render an award affecting the rights of parties without an examination into the facts or the exercise of judgment thereon; and in case of ambiguity in the submission, the doubt should be ruled against a construction which would produce that result.

In deciding under the submission in the present case that, because the umpire was to decide *differences* between the other arbitrators, he could arbitrarily render such decision without the exercise of judgment; in other words, that so long as he *decided* the difference, it would be wholly immaterial whether his decision was the result of whim and caprice, or judgment, the Court of Appeals entirely ignores the substantial purpose of the submission, to wit, the ascertainment of the actual loss, by the return of a true award.

2. If it be true, as held by the Court in its opinion, that Schurmeier was an umpire, with power to decide matters of difference between Treanor and Rockwood, and without consultation with them, the award should not be sustained for the reason that the consent of one of the other arbitrators thereto was necessary to make it binding upon appellants, and the consent of Rockwood was not so given as to make a valid award within the law relating to arbitrations.

Speaking of Schurmeier the Court says: "If his relation was that of arbitrator, the irregularity of his proceeding was clearly such as to invalidate the award. He refused to discuss the evidence or to act with the other arbitrators. He separated himself from the others to make his award in the seclusion of his room, without access to the damaged goods, and without other data than the estimates of Rockwood and Treanor and the cost price of the goods. He evidently arrived at his results by dividing the difference between the two arbitrators."

There can be no doubt that the conduct of Schurmeier as detailed by the Court would vitiate his award if he

was an arbitrator. All the authorities are to that effect. But such being the law, how can the award of Rockwood be sustained? Speaking of his conduct, the Court says: "Pending the arrival of Schurmeier, Treanor and Rockwood began the inspection of the stock. Treanor found the smoke damage to be practically nothing, while Rockwood began by estimating such damage at eight or ten per cent. But a day or two later, as the examination proceeded, he placed his estimate of such damage at an average of about fifty per cent. on the cost of the goods. *The evidence would indicate that there was little or no discussion between these two appraisers* (Treanor and Rockwood) *concerning the estimates thus given.* Treanor's testimony is that he frequently and from the first called upon his associate to specify wherein the damage claimed by him consisted, and that he often called Rockwood's attention to the fact that the goods claimed by him to be injured were in fact wholly uninjured, but that Rockwood refused to discuss the points of difference and answered all arguments by saying, 'We will leave it to the third man.' Rockwood, on the other hand, admits that there was no discussion, but attributes that fact to the insulting language and demeanor of Treanor towards him, which he says rendered amicable discussion between them impossible."

It further appears from the facts as stated in the opinion of the Court, that in arriving at the award there was no discussion or consultation whatever between Schurmeier and Rockwood, and it appears from the evidence that the latter concurred in the award without an examination of the allowances upon the separate items of

stock and without knowing the aggregate of his own allowances, *and upon his own confession, only for the purpose of saving further trouble.* (Trans., p. 153.)

Now, if the conduct of Schurmeier was such as to avoid his award if he was an arbitrator, why was not similar and equally reprehensible conduct upon the part of Rockwood, who concededly was an arbitrator, sufficient to avoid his award? As the case is stated by the Court, and the statement is supported by the evidence, Rockwood refused to consult or discuss matters of difference with Treanor, and Schurmeier refused to consult or discuss matters of difference with either Treanor or Rockwood, and without memoranda or data, and under the circumstances clearly unable to remember the damage to specific parcels, made an award of damage upon each item of goods in the stock. The substantial effect of this conduct was the equivalent of a separate examination by Treanor and Rockwood at different times, an award upon the part of Schurmeier splitting the difference between the two, and a concurrence by Rockwood in this award, so reached "for the purpose of saving further trouble." It is respectfully submitted that such an award is not, and should not be held to be, pursuant to the submission, which expressly provides that the amount of loss should be estimated and determined in detail by the three appraisers *together*, and that the award returned by the three or any two of them, should be a *true* return and award of the loss or damage *actually* caused by the fire. And the case of *Eads* vs. *Williams* (*ante*) is authority upon this point.

In reaching a correct conclusion upon the point under discussion, it is immaterial that the award of Schurmeier

was less than the amount that Rockwood was willing to allow. It is the *conduct* of Rockwood upon the arbitration which we challenge. In principle he was as guilty of misconduct as if Schurmeier had arbitrarily awarded a larger amount than his (Rockwood's) so-called estimate, and he had, "to save further trouble," concurred in such larger amount. This was expressly decided in *Haven* vs. *Winnesimmit Co.*, 11 Allen, 377, in which case the third arbitrator did not act upon his own judgment, but, as was done by Rockwood in the present case, united with the arbitrator whose figures were the nearest to his own. In opposition to a motion to vacate the award it was contended that, as the amount awarded was less than was, in his opinion, the correct amount, there was no just ground for complaint, but the Court held otherwise, saying: "He did not exercise his authority. * * * It is true he says he should have been willing to allow a greater sum in damages than is given by the award, if the arbitrator appointed by the plaintiff had fixed on a higher sum. *But this affords no argument in support of the award, because it cannot now be known that such would have been his opinion and judgment if he had formed it fairly and impartially, after due deliberation and consultation with the other two arbitrators, with both of whom he was authorized and bound to act in arriving at a conclusion in the case submitted.*"

The principle laid down in the foregoing quotation from the decision of the Court is morally sound, conservative of the rights of parties to arbitrations, and should, I respectfully submit, in the absence of authority to the contrary, be of controlling weight in the present case.

3. Thus far our argument has proceeded upon the theory that the Court is correct in holding that under the submission Schurmeier was not a third arbitrator, but an umpire, properly so-called. The Court concedes that if he was an arbitrator his award should be set aside. Appellants have always understood and been advised that under the form of submission used in this case the umpire or third man was in legal effect an arbitrator. Is not the Court wrong in holding otherwise?

In the first place, it is to be observed that not a single case has been cited by the Court in which, under a submission to three, with power in two to render an award, it has been held that the third man, whether called an umpire or not, was considered as other than a third arbitrator. Whether or not the third man is to be deemed an arbitrator or umpire, properly so-called, does not depend upon whether he is or is not designated in the submission as an umpire, *but upon the nature of the duties to be by him performed.*

In Morse upon Arbitration, 242, it is said: "The customary proviso, where a third arbitrator is desired, that after such third party shall have been named, the award of a majority shall be final, shows that such supernumerary is to act with his fellows, originally nominated, in hearing and deciding the controversy, *and this, too, although he be erroneously called an 'umpire.'* The award must then express the finding of, and be executed by at least a majority of the new board."

In *Mullins* vs. *Arnold*, 4 Sneed (Tenn.), 262, the submission was to Bomar and Stokes and provided: "In case said Bomar and Stokes cannot agree, they shall select a

third person as umpire, and in that case the determination of the majority shall be the award."

It will be observed that the provision in the case just cited is substantially identical with the one in the case in hand, and the Court, in passing upon the point now under discussion, and which was involved in that case, said:

"In general, where a reference is made to two arbitrators, and in case of a disagreement to an umpire, if they fail to agree and do not make an award, the umpire may proceed alone. And in such case the umpirage is in law the award of the umpire alone, though it seems that if the arbitrators join with him in his umpirage, it will be treated as surplusage and will not vitiate the award. But in the case under consideration this principle is excluded by the terms of the submission, which require the concurrence of at least one of the arbitrators with the umpire to make an award, for otherwise there cannot be a majority. In constructing this clause of the submission deed, it is obvious that the third person to be selected cannot be viewed as an umpire, but rather as a *third* arbitrator. And in legal effect it is a reference to the three arbitrators, in the event that happened with authority to two, or a majority of them, to make an award."

In *Stringer et al.* vs. *Toy et al.*, 10 S. E. Rep., 26, the submission was to two arbitrators *and an umpire*. "This mode of submission," said the Court, "necessarily implies an authority to two to make an award. * * * The office of an umpire is to decide in case they disagree."

I refer to this last case particularly because of the fact held, that a submission to two arbitrators and an umpire,

necessarily implies a decision by two, notwithstanding that the duty of an umpire *is to decide between the arbitrators*. In other words, if it can be gathered from the submission that the award is to be by the majority of the board, it is wholly immaterial that one of them is designated as an "umpire." And in the present case, if it had been intended that Schurmeier should act alone, it would not have been provided that the examination and appraisement should be *together with* the other two.

The Court of Appeals agrees with us that whether or not the third man is to be deemed an arbitrator or an umpire, properly so-called, does not depend upon whether he is, or is not, designated as an umpire, but is of the opinion that because in this case he was to decide differences between the other arbitrators his duties were those of an umpire.

This might be true if in deciding such differences he had the power to render a sole award, which an umpire properly so called may always do. But he had no such power, as the submission expressly provides that it is only the award of the *three persons named*, or *two of them* that should be of binding effect. The Court does not overlook this provision of the submission, but is of the opinion that in thus providing for an award by two "the parties * * * have only given expression to their caution by stipulating that the award of the umpire shall not be conclusive of their respective rights unless it shall be such as to meet the approval of at least one of the arbitrators."

Now it is right here, it seems to me, that the Court is radically wrong. The third man is only to come upon

the scene when the others have disagreed. He has not the power to render a sole award; either he must agree with one of the other arbitrators or one of them must agree with him. How can there be an *honest* agreement, or in fact any *agreement*, by either with the other, in the absence of consultation and discussion? It must be assumed that each of the differing arbitrators will come to an honest conclusion as to the amount of the loss. How can either, then, *under oath* as in the submission required, return the amount awarded by the umpire as *his* "true return and award" of the "amount in money of loss or damage *actually* caused by the fire," in the absence of some consultation and discussion with the umpire?

Take the case in hand. Treanor estimated the loss at $5,000 and the aggregate of Rockwood's separate estimates upon the different items was, in round numbers, about $115,000. Schurmeier, without consultation or discussion, and practically without examination, arbitrarily divided the difference between the other two, whereupon Rockwood, without consultation or discussion with Schurmeier, and without knowing the aggregate of his own allowances, or in what particulars his separate estimates differed from those of the umpire, approved and signed an award allowing over $50,000 less than he had estimated the true loss to be, and this, upon his own uncontradicted testimony, for the purpose of saving further trouble. In the absence of this explanation one of two things would have been clear, and either one sufficient to invalidate his award, to wit: either that his original estimates were fraudulent, or that his award was not a true return of the actual loss or damage caused by the fire.

Let us look at the language of the submission in another way. Suppose that neither of the arbitrators had receded from his original estimate. In that event there could have been no award, for under the submission it required two to make one which would bind the parties. Is it not clear that in such a case Schurmeier would have been poweless to *decide* any matter of difference between the arbitrators, and that the conclusion reached by him would not be a *decision* within the meaning of the submission?

In view of what has been said, must we not look to the whole submission to gather the meaning of the parties, rather than base the construction upon a single word found therein, however precise may be the meaning of that word separated from its context? And should not the Court adopt the spirit of those cases in which it has been held, as summed up by Morse (Morse on Arbitration, p. 242), to the effect that "The customary proviso, where a third arbitrator is desired, that after such third party shall have been named, the award of the majority shall be final, *shows that such supernumerary is to act with his fellows originally nominated in hearing and deciding the controversy, and this, too, although he be erroneously called an umpire.*"

In the cases upon this point cited *ante* the fact that the award was to be by a majority was held conclusive of the duties of the third man, and this, nothwithstanding that he was designated as an umpire. Now, the use of the word "umpire" in the submission considered in those various cases, would, in the absence of the context to the effect that the award was to be by a majority, have carried

the scene when the others have disagreed. He has not the power to render a sole award; either he must agree with one of the other arbitrators or one of them must agree with him. How can there be an *honest* agreement, or in fact any *agreement*, by either with the other, in the absence of consultation and discussion? It must be assumed that each of the differing arbitrators will come to an honest conclusion as to the amount of the loss. How can either, then, *under oath* as in the submission required, return the amount awarded by the umpire as *his* "true return and award" of the "amount in money of loss or damage *actually* caused by the fire," in the absence of some consultation and discussion with the umpire?

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with it conclusive evidence that the third man was alone to decide differences and make the award concerning the same, for the naming of the third man as an umpire would, in and of itself, have given him the power to decide the differences between the arbitrators. (Abbott's Law Dict., Vol. 2, page 613. "*Umpire.*") Why should the provision in the submission in the present case, for an award by the majority, be less effective in determining the character of the third man, merely because the parties have in language prescribed the duties to be performed which, in the absence of such language would, be implied from the naming of the third man as an umpire?

In *Hobson* vs. *McArthur*, 16 Pet. (U. S.), 18, the submission provided for two arbitrators and in the event of their disagreement, a third party who, together with the other two, should decide the point in dispute. The Court, in holding under this submission that the majority could render the award, said, speaking of the third man: "It is a more reasonable construction to consider the third man in the character of an umpire to decide between the two that should disagree." Now, it will be observed that under the submission considered by the Court in that case the party referred to by the Court as an umpire to "*decide between*" the other two was held to be a third arbitrator. Would not the companies adopting the form of submission used in the case in hand have been justified, with the decision of the Supreme Court just referred to before them, in supposing that in the Federal Courts a provision for an umpire to decide differences, the award of a majority to conclude the parties, would require of such an umpire the performance of the duties of an arbitrator?

The reason given by the Court in its opinion in the present case for holding that Schurmeier is not an arbitrator is, I respectfully submit, unsound. The Court says: "The parties to the agreement in making that provision have only given expression to their caution by stipulating that the award of the umpire shall not be conclusive of their respective rights unless it shall be such as to meet the approval of at least one of the arbitrators."

It is true in a certain sense that the award of the umpire approved by one of the arbitrators is all that is called for by the terms of the submission. But the manner in which the award of the umpire and the arbitrator agreeing with him is to be reached is the vital question which the explanation of the Court does not answer. The submission provides that the examination and determination of the sound value and damage shall be by the arbitrators and umpire *together*, and that the two agreeing shall *under oath, a true return and award make of the actual loss*. A determination of the amount of the loss, by the umpire *separate and apart from the others*, cannot be said to be made *with* them, and an approval of the award of the umpire by the agreeing arbitrator, made *separate and apart from his fellows*, is not a determination by him made "*together with*" the other two. If the award of the umpire and agreeing arbitrator should be reached in the manner provided for it would be within the submission, but otherwise, as shown by the cases cited in my brief, it would be void. *How* it should be made is the point to be finally decided in this case.

In reaching its conclusion as to the construction to be put upon the submission the Court has wholly overlooked

the provision that although the award must be by two of the arbitrators it may be by all three. Reading the submission in the light of this provision it is quite clear that while differences might arise which the umpire would be called upon to settle, still, as the result of consultation and discussion those differences might be so harmonized as to bring about an award in which all three could and would unite. If the third man was to act as an umpire to decide differences only there would be no room for an award by three. It would seem that it was intended that the third man should discuss with the other two their differences, with the right to unite with both in case he could agree with both, failing in which to agree with one or the other and thus produce a majority award, which should bind the parties to the controversy. The construction which we put upon the submission gives force and effect to every clause thereof; that put upon it by the decision which we challenge gives neither effect nor meaning to the permission for an award by three, or the requirement for the concurrence by two.

4. In its opinion the Court apparently overlooked a point which it seems to me ought to be conclusive upon all the propositions discussed in this brief, and that is, the construction put upon the submission by the pleadings of respondent.

In our bill of complaint the award was attacked upon all the grounds mentioned in the opinion of the Court, and it is not to be supposed that if appellee had considered Schurmeier as an umpire with power to separate himself from his fellows, and, alone and without consultation or discussion, arrive at an award, it would not in its demurrer

and answer have made this view apparent. Upon the contrary, it has in every pleading filed, inferentially admitted the correctness of our construction of the submission. No suggestion of any difference with us concerning the meaning of the submission appears in the demurrer, and in the answer (pp. 24–6) it is expressly alleged that the award was the result of a joint examination and consultation —a wholly unnecessary averment if Schurmeier was authorized to pursue the course now sanctioned by the Court of Appeals. This exposition of the understanding of the parties to the submission should, I think, solve in appellant's favor the ambiguity which the Court finds in the language of the submission.

THIS IS A CASE IN WHICH *CERTIORARI* SHOULD BE GRANTED, AS PROVIDED FOR IN SECTION 6 OF THE ACT CREATING THE CIRCUIT COURTS OF APPEALS.

1. *In re Wood et al.* 143 U. S., 242, this Court, construing section 6, above referred to, said: "In the interest of jurisprudence and uniformity of decision, to use the language of the eminent jurist and statesman, who had charge of the bill, provision was made under section 6 for such supervision on our part as would tend to avert diversity of judgments, and guard against inadvertence of conclusion of controversies involving weighty and serious matters."

As within the rule thus announced, the Court granted *certiorari* in *Steel* vs. *The Phœnix Ins. Co.* (No. 1260) in which case, the question for decision, and to review which *certiorari* was asked, was the proper construction of a provision in a policy of fire insurance concerning the

time within which an action might be brought upon the policy. The argument in that case in favor of the issuance of the writ, as stated in the brief of petitioner, was as follows. (I quote from pp. 21–22): "The importance of the question presented here, at least that as to the construction of the limitation clause, can be submitted within a very narrow compass. Fire insurance has become an absolutely indispensable incident of modern business transactions, in addition to being almost universally resorted to as a safe guard against loss in the matter of private residences and property. It is one of the most important factors in the commercial world. Everything which tends to simplify and make certain the relations between insurer and insured tends to the advancement of trade relations and the security of persons in their private possessions. The interest of both parties to the contract imperatively demands that the rights and liabilities of each should be reduced to the utmost degree of definiteness and simplicity. It is alleged in the petition that a number of insurance companies are employing this form of policy, and the statement is corroborated by the adjudicated cases, which have been herein cited. It is safe to say that many thousand persons are holding such policies to-day, and that they represent millions of dollars. Apart from the concern of the insurance companies, the question involved here is one of very general public interest, and the importance of its correct determination can be exaggerated."

In the case in hand the general importance of a correct exposition of the question for decision is much greater than was the policy limitation construed in the Steel case.

The aim and object of the arbitration proceedings provided for in fire policies is to insure a fair determination, by competent persons, of the amount to be paid, and to prevent litigation growing out of disputes concerning the amount of loss—a question of fact pure and simple. Such an exposition of submission agreements entered into pursuant to the arbitration clause as will fairly protect the rights of insured and insurer, by keeping the parties out of Court, will lessen litigation while securing more satisfactory settlements, while a narrow and technical construction such as has been placed upon the agreement by the Court of Appeals, can only tend to drive the companies into contests through the courts, thus increasing the cost of insurance, delaying settlements, and provoking hostility between the companies and those with whom amicable business relations should, if possible, be maintained.

The decision of the Court of Appeals, if permitted to stand, will destroy one of the most efficient safeguards against over-insurance and over-claim which insurance companies now have under their contracts. The tendency of juries to award claimants all that they ask as against insurance companies is well known, and the arbitration clause is a protection against such over-allowances. If the rule of law is to be that in case of differences between the arbitrators selected by the claimant and insurer the man called in to decide such differences may, without examination or the exercise of judgment, split the difference between the other two, the benefit of the contract provision will be wholly dissipated; for in such case the umpire, if not over-conscientious, will, in order to save

himself trouble, pursue this course, and the arbitrator appointed by the insured, when over-zealous in the interest of the party appointing him, will place his valuation so high as to produce, when the difference is split, a figure satisfactory to his principal. So also, if the arbitrator appointed by the insurance company should seek to secure a beneficial result to the company, independently of what might be right, he would so reduce the amount of his allowance in order to secure the lowest possible award when the umpire made his cut through the sum of the separate allowances.

From what has been said it can be seen that the decision in this case bears directly upon a contract, in the proper construction of which every fire insurance company and every owner of property in this country is interested. And indeed the effect of the decision must extend far beyond those interested in fire insurance contracts, for arbitrations are now becoming the means by which disputed questions in every relation of life are settled, and the construction put upon these agreements by the Court of Appeals applies to all submissions under which an umpire is to act.

2. The question for decision in this case is also properly reviewable by this Court upon *certiorari* in the interest of uniformity of decision.

Briefly stated, the decision of the Court of Appeals is that under a submission to two, and such third person as they shall select as an umpire to decide differences between them, the three so appointed, or any two of them, to render the award, such third person need not consult or reach his award in company with the others, and that

an award by him is good, although not based upon examination or the exercise of judgment, provided it in fact states an amount as determinative of the existent difference between the others.

(*a.*) The conclusion reached by the Court upon the first point embraced within its decision as above stated, is in conflict with the expressed views of this Court in two cases, and, so far as I am aware, with all the decisions in the State courts.

It is conceded in the opinion that designating Schurmeier as an "umpire" does not, in and of itself, give to him the power to consider the evidence and return his award separate and apart from his fellows, provided other language in the submission evidence a different intention. The cases upon which this rule, and the concession of the Court rests, have been heretofore cited in this brief. But it is held by the Court that the language of the submission does evidence such intention. The conclusion thus reached is, I submit, not in harmony with the views expressed by this Court in *Lutz* vs. *Linthicum*, 8 Pet., 165, and in *Hobson* vs. *McArthur*, 16 *Id.*, 18.

In the former of these cases the submission was to "William S. Nicholls and Francis Dodge * * referees between the parties * * with liberty to choose a third person; and that they or any two of them when the whole matter concerning the premises between the parties aforesaid at variance being fairly adjusted, have their award," etc. It was contended that under this submission the duties of the third man were those of an umpire but this Court in stating its reason for holding otherwise said: "The submission under the rule of

Court did not contemplate the third referee to be a mere umpire in the case upon a difference of opinion of the other two; but an original referee to be chosen by the other two, and when chosen to constitute a part of the board authorized to hear and decide the cause. How otherwise are we to understand the language of the rule? 'They (that is the three) or any two of them, are to have their award in writing,' etc., which words plainly contemplate the case of a hearing by all of them." The only difference between the submission in the present case and the one in *Lutz* vs. *Linthicum*, is that in the former the umpire was to decide in matters of difference, but the fact remains that the award was to be by three or or any two of them, clearly contemplating, as is said by this Court, a hearing by all of them. In the absence of such a hearing how could the umpire determine which was right and which wrong?

In *Hobson* vs. *McArthur*, 16 Pet. (U. S.), 18, the submission provided for two arbitrators and in the event of their disagreement, a third party who, together with the other two, should decide the point in dispute. The Court, in holding under this submission that the majority could render the award, said, speaking of the third man: "It is a more reasonable construction to consider the third man in the character of an umpire to decide between the two that should disagree." Now, it will be observed that under the submission considered by the Court in that case the party referred to by the Court as an umpire to "*decide between*" the other two was held to be a third arbitrator. Would not the companies adopting the form of submission used in the case in hand have

been justified, with the decision of the Supreme Court just referred to before them, in supposing that in the Federal courts a provision for an umpire to decide differences, the award of the majority to conclude the parties, would require of such an umpire the performance of the duties of an arbitrator?

Mr. Morse in his work upon Arbitration and Award, stating the result of all the cases, says that "the customary proviso, where a third arbitrator is desired, that after such third party shall have been named, the award of a majority shall be final, shows that such supernumary is to act with his fellows, originally nominated, in hearing and deciding the controversy, and this, too, although he be called an 'umpire.' The award must then express the finding of, and be executed by at least a majority of the new board."

(*b.*) The conclusion reached by the Court upon the second point by it decided as hereinabove stated is directly in conflict with the doctrine announced by this Court in *Passmore* vs. *Pettitt*, 4 Dall, 271, in which it was held that "when an umpire is chosen by referees, he stands in the same situation precisely as the referees themselves, both with respect to powers to be exercised, *and duties to be performed.*" (The italics are mine.) It is also, upon the second point, in conflict with the decision of this Court in *Falconer* vs. *Montgomery*, 4 Dall, 232 in which, in setting aside an award by an umpire, rendered upon an inspection of the evidence taken by the disagreeing arbitrators without a rehearing, the Court said that "the plainest dictates of natural justice, must prescribe to every tribunal the law, that 'no man shall

be condemned unheard.'" If an award rendered by an umpire upon evidence taken is invalid because there has been no rehearing had, how much more so must one be not rendered upon any evidence but based wholly upon an arbitrary caprice.

In *Warren* vs. *Tinsley*, 53 Fed. Rep., the Circuit Court of Appeals holds that "the doctrine is well established that, where an arbitrator proceeds entirely *ex parte* without giving the party against whom the award is made any notice of the proceeding under the submission, the award is void, and it is not necessary to show corruption on the part of the arbitrator," citing *Ingraham* vs. *Whitmore*, 75 Ill., 24; speaking of which last mentioned case the Court continues: "*Ingraham* vs. *Whitmore* is approved, and the same rule is applied, where an umpire was called in on disagreement of the arbitrators in *Alexander* vs. *Cunningham*, 111 Ill, 511."

When this case was in the Circuit Court the learned Judge before whom it was tried had occasion upon demurrer to determine whether or not an award of the umpire (so-called) would be valid in the absence of examination and the exercise of judgment based thereon, and reached the conclusion that it would not. (44 Fed. Rep., 151.) Speaking to this point it is said (p. 154): "If Schurmeier did not examine the damaged goods, but procured the separate estimate of each of the other arbitrators, and then obtained the bills, invoice books and inventories of defendant, and made up his estimate of damage and loss from these, he was guilty of misconduct which should avoid his award. It is evident from what appears in the bill that it was intended the arbitrators should make a

personal examination of the damaged property. At all events, they should take some evidence upon this subject such as would qualify them to form some just estimate of the damage sustained. In this case it was not contemplated that they were to act without evidence. How could Schurmeier tell which was right in his estimate of damage without some evidence bearing upon the issue presented. He does not seem to have consulted either of the other arbitrators. Bills, invoice books, and inventories, would not seem to be proper evidence alone upon which to base an estimate of the damages or loss to the property on account of the fire. When an arbitrator acts without sufficient evidence, or without a full hearing, or any hearing of a case submitted to him, his award is void for misconduct."

Mr. Morse (Morse on Arb. and Award) stating the rule concerning the obligation of arbitrators to exercise fair judgment in reaching their award (and as we have seen in *Passmore* vs. *Pettitt*, *supra*, the duty of an umpire in this respect is the same as that of an arbitrator) says (p. 165) that "they must exercise *judicial* discretion and judgment," and again, upon p. 316, that "as intelligent men they judge of the facts and merits finally, as a jury does; that their discretion and judgment upon all question of fact or merits are absolutely final," etc.

From the foregoing review of the authorities it would seem that the decision of which we seek review is in conflict with both Federal and State decisions; and it is further manifest, I submit, that the former express upon both the points decided by the Court of Appeals the true rule. The latter Court, in its decision, is out of line

be condemned unheard.'" If an award rendered by an umpire upon evidence taken is invalid because there has been no rehearing had, how much more so must one be not rendered upon any evidence but based wholly upon an arbitrary caprice.

In *Warren* vs. *Tinsley*, 53 Fed. Rep., the Circuit Court of Appeals holds that "the doctrine is well established that, where an arbitrator proceeds entirely *ex parte* without giving the party against whom the award is made any notice of the proceeding under the submission, the award is void, and it is not necessary to show corruption on the part of the arbitrator," citing *Ingraham* vs. *Whitmore*, 75 Ill., 24; speaking of which last mentioned case the Court continues: "*Ingraham* vs. *Whitmore* is approved, and the same rule is applied, where an umpire was called in on disagreement of the arbitrators in *Alexander* vs. *Cunningham*, 111 Ill, 511."

When this case was in the Circuit Court the learned Judge before whom it was tried had occasion upon demurrer to determine whether or not an award of the umpire (so-called) would be valid in the absence of examination and the exercise of judgment based thereon, and reached the conclusion that it would not. (44 Fed. Rep., 151.) Speaking to this point it is said (p. 154): "If Schurmeier did not examine the damaged goods, but procured the separate estimate of each of the other arbitrators, and then obtained the bills, invoice books and inventories of defendant, and made up his estimate of damage and loss from these, he was guilty of misconduct which should avoid his award. It is evident from what appears in the bill that it was intended the arbitrators should make a

personal examination of the damaged property. At all events, they should take some evidence upon this subject such as would qualify them to form some just estimate of the damage sustained. In this case it was not contemplated that they were to act without evidence. How could Schurmeier tell which was right in his estimate of damage without some evidence bearing upon the issue presented. He does not seem to have consulted either of the other arbitrators. Bills, invoice books, and inventories, would not seem to be proper evidence alone upon which to base an estimate of the damages or loss to the property on account of the fire. When an arbitrator acts without sufficient evidence, or without a full hearing, or any hearing of a case submitted to him, his award is void for misconduct."

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with the decisions both in and out of the Circuit, which fact brings this case squarely within the intention of section 6 of the Act creating the Federal Courts of Appeals, and the principle governing the action of this Court in granting *certiorari* in *Steel* vs. *Phœnix Ins. Co.*, heretofore referred to. Petitioners, therefore, respectfully ask that the prayer of their petition may be allowed, and that the case be further heard and determined by this Court, both because of the general importance of the points involved and in the interest of uniformity of decision.

T. C. VAN NESS,
Of Counsel.

IN THE

Supreme Court of the United States.

THE HARTFORD FIRE INSURANCE COMPANY ET AL., PETITIONERS,

v.

THE BONNER MERCANTILE COMPANY, RESPONDENT.

No. 1034.

Reply Brief for Petitioners.

In my original brief in support of petitioners' application for certiorari, I stated the facts upon which the petition is based quite fully, and quoted at length from the decision of the court of appeals which it is sought to have reviewed. The brief for respondent does not challenge the correctness of the statement of facts, nor the accuracy of the quotations. It will, therefore, be unnecessary to consider the record further than as it is disclosed in the petition and briefs.

The theory of petitioners is that upon the facts found by the appellate court, *as stated in the opinion and decision of that court*, the judgment of the court should have been in reversal of the lower court instead of in affirmance. This Court is not called upon to determine *in this proceed-*

ing what the judgment ought to be upon a full consideration of the whole record. If upon the facts found by the court of appeals, the decision is erroneous, and the case is one of gravity and importance, or in which, for the sake of uniformity of decision, this Court should review the case, the writ will issue. Decision upon the merits will follow the full consideration of the case after it shall have been certified to this Court for review. For the purposes of this proceeding the facts must be deemed to be as found by the court of appeals; it is the decision of that court touching the law applicable to the facts so found that we challenge, and review of which we seek in this Court.

The counsel for respondent seem to agree with us in what has thus far been said, for they say (p. 1):

"Nor do we suppose this Court will enter upon any detailed review of the law and facts in this case in the decision of the question whether certiorari shall issue or not." They add, however, "But as the petitioner has made a lengthy argument of the facts, citing numerous authorities, we ask to be allowed to submit in connection with this brief our original brief," &c.

It is to be observed that the facts upon which we rely are taken from the opinion of the court, and are the facts found by the court, and, as already noticed, the accuracy of our statement is not questioned.

With so much by way of premise, it will only be necessary to notice very briefly the argument in opposition to our application.

1. Pages three and four of respondent's brief are to the effect that Schurmeier's award was not an arbitrary middle cut between the figures of the other two arbitrators, but was the result of due examination, consultation, and decision. This is but a reiteration of what the respondent

has always contended. *But the court of appeals has decided otherwise.* It says (see opening brief, p. 10): "He" (Schurmeier) "refused to discuss the evidence or to act with the other arbitrators. He separated himself from the others to make his award in the seclusion of his room, without access to the damaged goods, and without other data than the estimate of Rockwood and Treanor and the cost price of the goods. *He evidently arrived at his results by dividing the difference between the two arbitrators.* There is evidence that he occasionally consulted some meagre memoranda of his own, written upon a sheet of paper or upon a pocket note-book. But when the vast number of the items of the stock is considered, and the impossibility of retaining in the memory, unaided by memoranda, a recollection of the extent of the injury, to each parcel of the goods, *it is impossible to arrive at any conclusion other than that Schurmeier arbitrarily adopted an estimate that practically lay midway between the estimates made by Rockwood and Treanor.*" (The italics are ours.) Language could not be plainer nor the intention of the decision clearer.

Upon page 4 of their brief the counsel say: "We admit that Schurmeier could not arbitrarily and without reason or investigation select a middle sum and say, I will award this because it is a middle sum." That is precisely our position. It is true that Schurmeier did not "say" that he arrived at his results that way, but upon the evidence taken, upon the record, the Court finds that it was just in that way that the result was reached.

2. The submission to arbitration is not correctly stated by the counsel upon page 6 of their brief. The material and qualifying clause upon which we rely, to wit, that the award should be by the three arbitrators, or any two of them, is omitted. The language of the stipulation of sub-

mission is correctly stated in the opinion of the court. It is to be observed that the omission by counsel was not intentional, as the qualifying clause is elsewhere in their brief referred to.

3. The cases of Kelderhouse *v.* Hall, (116 Ill. 147) and Enright *v.* Montauk, referred to by the counsel, have no application in this case. Kelderhouse *v.* Hall does not even remotely relate to any question open to discussion, and in Enright *v.* Montauk nothing more is decided than that under a submission to two together with a third person to be appointed, *if necessary*, an award by the two without the appointment of the third is good, it never having become *necessary* to call in the latter.

4. We do not claim that this is a case of importance because it involves the payment or non-payment of $40,000; or that it comes under the "uniformity of decision" clause of the act because it involves the construction of the particular contract considered by the court. *Steel* v. *Phœnix Ins. Co.*, referred to in my opening brief, is authority for our petition in this case; but in addition to what was said in that brief, based upon the ruling in the Steel case, it is proper to add a few words in view of the suggestion of counsel that the effect of the decision of the court of appeals in this case can be avoided by drafting future arbitration agreements in some different form. The answer to that proposition is that the radical vice of the decision is in holding that an umpire, *as such*, can render an arbitrary award not based upon evidence or the exercise of judgment. The principle thus decided revolutionizes the construction of these arbitration agreements and places the law in the ninth circuit in antagonism to that in other jurisdictions. The principle thus decided is broader than the language of any submission agreement; is radically vicious in its

tendency, and should not be permitted to stand as the law in one circuit in opposition to that in the others, in the State courts, and in this Court.

It is respectfully submitted that the writ should issue as prayed for.

T. C. VAN NESS,
Of Counsel for Petitioners.

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CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

THE HARTFORD FIRE INSURANCE COMPANY
ET ALS.
(Petitioners)

VERSUS

THE BONNER MERCANTILE COMPANY
(Respondent).

RESPONDENT'S BRIEF

M. KIRKPATRICK,
JAMES W. FORBIS,
Attorneys for Respondent.

INTER MOUNTAIN PUBLISHING COMPANY
BUTTE CITY, MONTANA

IN THE

SUPREME COURT

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THE HARTFORD FIRE INSURANCE COMPANY
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VERSUS

THE BONNER MERCANTILE COMPANY
(Respondent).

RESPONDENT'S BRIEF

In the short time intervening before the presentation of the petition for certiorari in this case it would be impossible for the respondent to present an argument or brief reviewing all the facts in the case, or discussing the respondent's view of its merits; nor do we suppose this court will enter upon any detailed review of the law and facts in this case in the

decision of the question whether certiorari shall issue or not. But as the petitioner has made a lengthy argument of the facts, citing also numerous authorities, we ask to be allowed to submit in connection with this brief our original brief filed before the Circuit Court of Appeals, to be used by this Court, so far as this Court may care to look into the general merits of the controversy.

Amount Involved in This Case.

It will be observed by the Court that the amount involved in this controversy is not the sum of about sixty thousand dollars, but only that proportion thereof for which petitioners are liable. It is alleged in the bill that some of the insurers have paid their proportion of the loss, and consequently are not parties to this action. The amount paid, as we recollect, was about twenty thousand dollars, leaving unpaid a balance of about forty thousand dollars, which is the true amount involved in this action.

As to the Examination of the Matters in Controversy by the Umpire.

From petitioners' brief we infer that he is of the opinion that the Circuit Court of Appeals held that the Umpire did not take any evidence or make any

examination of the matters in controversy, but accepted a middle sum between the arbitrators without any such investigation. Such is not the fact. Schurmeier investigated fully as much as either of the arbitrators. He was with them constantly and controlled the actions of the arbitrators, as well as the parties. He acted with the acquiescence of the parties and arbitrators, as absolute and resolute umpire. He conducted the entire proceedings, and no one objected; upon the examination of each article he observed the notations in the books; what was allowed by each arbitrator, and, when necessary, made notations of his own. This action in itself put a construction upon the agreement for arbitration, and all parties by their conduct from the arrival of Schurmeier until the completion of the investigation acquiesced in treating him as an umpire, and in referring all matters of difference to him. Not only did Schurmeier investigate as much as either arbitrator, but he investigated to the entire satisfaction of all parties concerned. He investigated everything that he was asked to investigate, and when the examination ceased it was agreed, without dissent from any one, that the examination had closed, as fully and to the same effect as if it had been the trial of the case in a court of law.

Schurmeier's Award.

At the conclusion of the examination, Schurmeier, not only with the acquiescence, but at the request of the arbitrators and parties, withdrew from the presence of all parties to make his award. The parties all knew where he was going; they procured the rooms for him, and each party employed clerks and sent them to assist him in his computations.

Schurmeier took with him the books which had been kept by the clerks while the stock was being examined by him and the arbitrators, and from these books arrived at his award.

We assume it cannot be successfully contended that because Schurmeier's figures are nearly midway between the figures of the arbitrators, that therefore he did not exercise judgment in arriving at such figures. We admit that Schurmeier could not arbitrarily and without reason or investigation select a middle sum and say, I will award this because it is a middle sum. But if, on the contrary, he believed a middle sum to be the correct amount, it was not only his right but his duty to so announce. If, during the examination, he believed that one arbitrator was about as much too high as the other was too low, then the middle figure would be the one that would suit his judgment. In such a case his award would be legal and just.

If such an amount be the judgment of the umpire, the law is satisfied and will not inquire whether his judgment be correct or not.

It is to this effect that the Circuit Court of Appeals cites Morse on Arbitration and Award.

> Water-Power Company v. Gray, 6 Metc. (Mass.), 131.
> Pulliam v. Pensoneau, 33 Ill., 375.

Counsel seems to think that these authorities do not bear out the Court in its opinion. We only ask for a reading of the authorities as a full vindication of the lower court.

The Circuit Court of Appeals did not announce that it would be unnecessary for an umpire to make an investigation of the matters referred to him; but, on the contrary, as appears by the opinion of the Court, Schurmeier made all the investigation that was necessary to satisfy the Court that he acted upon his judgment — and further than that the Court cannot go.

Was Schurmeier an Umpire or an Arbitrator.

Aside from the construction of this agreement given by the parties by their conduct throughout the entire proceedings whereby Schurmeier was recognized as an umpire, we contend that under the

terms of the agreement of submission he was not an arbitrator at all, but an umpire, and as such authorized to act solely and conclusively in all matters of difference between Rockwood and Treanor.

The contract as set forth in the complaint provides that the loss to the stock of goods should be "determined in detail by G. E. Rockwood and Joseph P. Treanor, together with a third person to be mutually selected and appointed by said Rockwood and Treanor, who should act as umpire to decide between them, the said Rockwood and Treanor, in matters of difference only." (Pages 4 and 5.)

We know there is a line of authorities which hold it is immaterial what name is given to the arbitrator or umpire, and that where he is designated as umpire it is often construed that he is a third arbitrator, but we submit that those authorities are under a different contract from that in this case. In those cases it was provided that the third person was to act with the other two in arriving at a conclusion, and, although called an umpire, the designation was erroneous, and the courts held that he was a third arbitrator. The agreement of submission in the cases cited is like those found in contracts where the matter is submitted to two arbitrators, one selected by each party, and if those two could not

agree they should select a third person, and a majority of such board should decide the matters in controversy. In such cases we admit that the designation of umpire would not alter the nature of the third arbitrator, but that he would be an arbitrator, although called an umpire.

But observe the difference in this contract. Schurmeier was not to agree with either of the parties, nor was it incumbent upon him to have either party agree with him, but the terms of the contract are that Schurmeier was to decide between them, not with them. The question as to whether Schurmeier was an arbitrator or umpire is simply a question of construction, and it seems to us that the agreement speaks for itself, and there is nothing in it to be construed by the Court. He is not only called an umpire, but the duties to be performed by him are those of an umpire.

The contract also provides that any two of the persons selected should a true return and award make as to the loss. We submit, however, that the decision of Schurmeier was conclusive, and that the only necessity for one of the arbitrators to join in his report was in order to verify or prove it, and that under the terms of this contract Schurmeier's award would necessarily be conclusive, even if it had not been joined in by either of the arbitrators,

but as one of the arbitrators had joined in the award it is unnecessary to discuss that question.

Enright vs. Montauk Fire Ins. Co., 15 N. Y. Sup., 893.
Kelderhouse vs. Hall, 116 Ill., 147.

We have examined as closely as our time would permit the authorities cited in counsel's brief, and we believe, without exception, the contracts construed in those cases provide that the third person to be selected should act *with* the other two in arriving at an award.

It would be useless to cite authorities construing this agreement, because we cannot find an agreement like it that has ever been construed by the courts, except as hereinbefore cited, and the authorities cited by counsel for petitioners we submit are not, directly or indirectly, authorities for the construction of the agreement in controversy in this action.

Will This Court Issue Certiorari in This Case?

While we did not deem it necessary to do so, we have called the Court's attention to the facts in the case, in order that the Court might determine whether the case is one in which certiorari will be issued, as provided by the act of Congress in such cases.

In Law Ow Bew vs. United States, 144 U. S., at page 58, this Court announced that "certiorari will only be issued where questions of gravity and importance are involved, or in the interests of uniformity of decision."

It cannot well be contended that there is any question of gravity or importance involved in this controversy. Certainly the fact of $40,000 or more is not grave or important within the meaning of the Court's decision. If the amount is to fix the status of a case and to determine whether this Court should hear the same or not, the statute would have provided for the appeal, or the issuance of writs of error, in all cases involving a certain amount.

The controversy cannot be said to be important to any one except the parties to it, and to them only to the amount of money involved. It is not shown, and probably could not be shown, that any other agreement like the one for submission to arbitration in this case is in existence. The agreement in this case, like all other agreements, stands upon its own wording for its construction. There has been no strained construction put upon language, nor do the petitioners claim that there has. The Court has simply found the meaning of the agreement, and of the parties in making the same, from the terms and conditions used.

There is no showing, and in fact could not be any, to the effect that other property rights are involved in the construction of this agreement. Nor can it be claimed that any future rights or property must depend upon the construction of this agreement. If the parties do not like the construction, there is nothing to prevent them from so framing an agreement as to express their clear meaning.

But the petitioners also claim the intervention of this Court upon the ground of uniformity of decision. As we have already stated, there is no decision construing a contract similiar to the one involved in this action. The authorities cited by the petitioner are not at all in point. The contract in each of the cases cited were contracts that provided that the third person selected should find an award "*with*" the other two. In the present case the third person is to decide "between" the other two, and then "*only in matters of difference.*" Contracts could not be further apart in meaning or expression. And we deem it idle to attempt to draw any rule of construction from decisions not involving the same facts or principles.

If this Court should attempt, in the interests of uniformity of decision, to review every case where parties imagine they have found judicial authority for the construction of contracts, to review the

Circuit Court of Appeals, we can imagine but a very slight decrease in the labors of the Supreme Court by the constitution of the Court of Appeals.

We respectfully submit that the writ of certiorari should be denied.

M. KIRKPATRICK,

JAMES W. FORBIS,

Attorneys for Respondent.